93-542

Supreme Court, U.S.
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No. _____

IN THE

# Supreme Court of the United States

October Term, 1993

In the Matter of
PARUL P.,
A Child Under Eighteen Years of Age Alleged to be
Abused by RASHMI, P.,

*Petitioner,*

-against-

COMMISSIONER OF SOCIAL SERVICES,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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## QUESTIONS PRESENTED

1. Where the judgment of the Family Court is recognized by the Appellate Courts of the State of New York as indeterminately prohibiting petitioner from living in the same household with the child could the Court make such a determination applying the civil preponderance burden rather then the higher burden of clear and convincing where the charges confronted by the petitioner were in substance felony and misdemenor charges of sexual abuse?

2. Could petitioner receive a fair trial where the Family Court denies petitioner a time frame as to when petitioner was alleged to have committed the complained of acts of sexual abuse, denied petitioner the tapes of sessions with the validator and the records of the validation containing exculpatory material so as to impair effective cross examination of the validator and in addition, denied an opportunity to present an effective defense when the court denied petitioner's application to take testimony by commission or deposition in India and in Pennsylvania and also ignored petitioner's request to arrange for a Gajarti interpreter?

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## PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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## OPINIONS BELOW

The opinion of the New York State Supreme Court, Appellate Division, Second Department is officially reported as in the Matter of *Parul P, Rashmi P. v. Commissioner of Social Services*, 85 AD 2d 981 (2nd Dept. 1992) and appears in Appendix A hereto at 19-39.

The Family Court decision *of Kaufman, J not otherwise reported dated October 12, 1989* is reproduced in Appendix B at p.4a-16a and orders of disposition are reproduced as Appendix B1 at 17a-20a.

## JURISDICTION

The final order of the Appellate Division affirming the Family Court order had been served by mail upon Petitioner with the notice of entry dated September 11, 1992 said order is reproduced as Appendix A at 1a to 3a. Thereafter petitioner sought leave to reargue and leave to go to the New York Court of Appeals which applications were denied by the Appellate Division Second Department by its order dated February 1, 1993 reproduced at Appendix C at 19a-20a. Thereafter petitioner filed a motion for leave to go to the New York Court of Appeals which was denied by the New York Court of Appeals by its order dated July 1, 1993 said order of denial is reproduced in Appendix D at 21a. In accordance with Rule 13.1 of this Court, this petition is filed within 90 days of the date of denial of discretionary review (leave to appeal). The jurisdiction of this Court is invoked under 28 U.S.C. *Sec 1257(a) (1988)* because the judgment of the Appellate Division sought to be reviewed draws into question the validity of section 1043(b)(1) of the New York Family Court Act on the grounds of its being repugnant to the Constitution of the United States. Petitioner further avers that the manner in which his trial was conducted violated the due process clause of the Fourteenth Amendment to the United States Constiutution which issue lies within this Court's jurisdiction to review.

As required by Rule 29.4(c) of this Court petitioner states that 28 U.S.C. 2403(b) (1988) may be applicable because this proceeding will seek *inter ailia* to question the constitutionality of a state statute and the constutional and statutory provisions involved.

## A. Constitutional Provisions

The due process clause of the 14th Amendment to the United States Constitution.

The confrontation clause of the 5th Amendment to the United States Constitution:

> "...to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him"

The right to subpoena as set forth in the 6th Amendment to the United States Constitution:

> "...to have compulsory process of obtaining witnesses against him..."

## B. Statutory Provisions

New York State Family Court Act section 1043(b)(1) which reads

> (b) In a fact-finding hearing (i) any determination that the child is an abused or neglected child must be based on a preponderance of the evidence; and

New York State Penal Law Sections which reads

> *§ 130.55 Sexual abuse in the third degree*

A person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter's consent; except that in any prosecution under this section, it is an affirmative defense that (a) such other person's lack of consent was due solely to incapacity to consent by reason of being less than seventeen years old, and (b) such other person was more than fourteen years old, and (c) the defendant was less than five years older than such other person.

Sexual abuse in the third degree is a class B misdemeanor. (L.1965, c. 1030.)

*§ 130.60 Sexual abuse in the second degree*

A person is guilty of sexual abuse in the second degree when he subjects another person to sexual contact and when such other person is:

1. Incapable of consent by reason of some factor other than being less than seventeen years old; or

2. Less than fourteen years old.

Sexual abuse in the second degree is a class A misdemeanor. (L.1965, c. 1030.)

*§ 130.65 Sexual abuse in the first degree*

A person is guilty of sexual abuse in the first degree when he subjects another person to sexual contact:

1. By forcible compulsion; or

2. When the other person is incapable of consent by reason of being physically helpless; or

3. When the other person is less than eleven years old. Sexual abuse in the first degree is a class D felony. (L.1965, c. 1030.)

## STATEMENT OF THE CASE

The important issue raised by this case is the manner in which the State of New York by the device of labeling the Family Court Proceeding Sex abuse trial as a civil proceeding convicts and metes out punishment which tears a family asunder for years, in a proceeding in which the petitioner father (Rashmi P) had to face trial in the following circumstances:

(a) The charging instrument the petition is devoid of any time frame except as of the date upon which the child is alleged to have complained to the authorities.(see Appendix G p. 31a to 38a)

(b) The fact that the Court would not aid defense counsel in enforcing process so that defense counsel was unable to utilize the validators records of recorded sessions with the infant on cross examination. (taped sessions)

(c) The fact that the State of New York allows the Family Court, sitting without jury, to apply the civil burden of preponderance rather than clear and convincing or beyond a reasonable doubt in trying the petitioner on a sex abuse charge which is in substance the identical charge that petitioner was confronted with in the New York State Supreme Court including a felony charge that were dismissed because in the circumstances of the due process available to petitioner as a defendant facing criminal charges petitioner could prove that he and his wife were in India at the time when the child here in the United States was to have been sexually abused by her father the petitioner herein.

(d) The denial to petitioner of fundamental devices needed to mount a defense such as an adequate bill of particulars, a commission to allow testimony by deposition of witnesses in India and Pennsylvania, and a *Gajarti* interperter.

Petitioner comes to this court to ask for a review of the treatment he has confronted under the judicial process of the State of New York wherein it is claimed the record of the Family Court proceedings clearly demonstrates the denial of fundamental rights to a fair trial.

## A. STATEMENT OF FACTS

It is undisputed that Parul is sexually abused on or about April 5, 1988. It is further undisputed that on April 5, 1988 Parul suffered this sexual abuse in Rego Park Queens County and that from and including April 1, 1988 to April 3, 1988, Petitioner was able to demonstrate to the satisfaction of the Supreme Court Queens County that petitioner *was in India with his wife*. (See letter of Michael V. Ricci dated reproduced Appendix E at 22a to 27a).

Because of this, the Supreme Court Queens County dismissed the indictment for sexual abuse against petitioner. But when petitioner is brought to trial in the Family Court what is in substance the identical charges for which he was previously indicted in the Supreme Court, the Family Court sitting without a jury and applying the civil preponderence standard will adjudge that he committed the acts based upon the corroberative testimony of a validator even though that validator could only lawfully attest that the child was sexually abused and could not lawfully identify an abuser.

B. The Family Court's findings that petitioner was the abuser was made under the following circumstances

1) As aforestated there is a police report in the record showing that abuse takes place April 5, 1988 (reproduced as Appendix F at 28a to 30a)

2) The petition only states the date that Parul brings the matter to the attention of her teacher and states no time frame for the acts (reproduced at Appendix G) (petitioner is never afforded a time frame by the prosecutor). (Corporation Counsel)

3) The testimony of the validator indicating that he

had failed to elicit significant data from the child:

The court:...Dr. Lewittes what information about this matter are you aware of now that you weren't aware of when you formed your original validation opinion on this case.

The witness: Your Honor, there has been hours of testifying, in my opinion by counsel about a lot of data that I had no awareness of and by sitting here hearing all about other children, other defendants other cases, other validations, I would have to, you know state that there has been a lot of information that's come out that I never knew when I interviewed the girl. (Tr 93 June 4, 1990)

The Court: Now if some of this information is true that has been mentioned by the attorney would it be important for you to reevaluate your opinion in this case.

The Witness: Well, Your Honor given the way this case has gone the answer to your question is I think it would be best if somebody else was appointed to form a new opinion (Tr. 92 June 4, 1990)

4) The fact that the Court ignores its own impeachment of the Commissioner's lay witnesses Gelber and Hausen.

A. Gelber a Board of Education employee is put on the stand to show that petitioner admitted the alleged sexual acts. However, when interrogated by the Court the following was, elicited:

The Court: Ma'am did you tell the gentleman sitting here in Court, Mr. Patel the father of Parul did you tell him what his child told you.

The Witness: No, I did not (Tr 10 Oct. 13, 1989)

B. Hausen a Social Worker is also placed on the stand by the Commissioner to recite an admission and the court interrogates.

The Court: Yes do you have any way of identifying the person who told you he was the respondent on the telephone other than the fact that the person told you he was the respondent on the telephone.

The Witness: Well, when I came into court and when he was here the first time that's how I know it was Mr. Patel because I was here in court.

The Court: Let me ask you this, before the person called you on the telephone, had you met the respondent Patel.

The Witness: No

The Court: Now did you recognize the voice of the person who told you he was Mr. Patel on the telephone?

The Witness: Then or now?

The Court: Now

The Witness: Well we never had anymore conversations.

The Court: So the person who told you he was Mr. Patel on the phone, that's the only time that you had spoken to or heard the voice of that person.

The Witness: Correct

The Court: So the only way you know that this person is Mr. Patel is by the person telling you he was Mr. Patel is that correct

The Witness*: Correct (Tr. 70-71 Nov. 13, 1989)

5) The fact that the Court denied all applications to petitioner that were necessary if petitioner was to be afforded the opportunity to interpose a defense.

6) The fact that while the court is trying the case it is cajoling petitioners counsel to settle which causes animus between court and defense counsel.

Mr. Ricci...We had an approximately two hour conference from around 12 o'clock to a quarter to two in chambers, over my objection and off the record. I would like you to state on the record all the things you think are appropriate, that occurred and were said in chamber discussion.

The Court: Well, I don't remember everything that was and wasn't said I remember what I tried to do, Mr. Ricci was to ask the attorneys if there was some way that

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*Before the Appellate Division Second Department petitioner applied to bring before that court proof that the Hausen testimony had been fabricated. During her testimony she told the court that petitioner had told her *he had been released from jail over the weekend* she testified from her records that this call came to her on *Monday April 10, 1989.* The records petitioner sought to bring before the Appellate Court clearly indicate that petitioner was arrested *Sunday April 9, 1989* and is not arraigned till 4:00 P.M. on April 10, 1989. The Appellate Division denied the application.

all of the parties could come to a consent resolution of this case. A resolution of the case that would be in the interest of your client, in the interest of the child. (Tr. 117-118 June 4, 1990)

7) The child never testifies. The Commissioner attempts to put her on the stand with the following results:

The Court: I said in the robing room that when I started to question the child here in Court, sitting next to me, I noticed that she could only answer questions by nodding her head and she looked extremely frightened and began to cry...

I therefore suggest that the child be immediately referred for therapy and that there be some report after she has been in therapy as to whether or not it would be appropriate for the child to testify in open court and is the presence of respondent or to testify in amaera or soem other manner (Tr. 88 Nov. 13, 1989)

## REASONS FOR GRANTING WRIT

1. This case involves the fundamental question as to whether petitioner Patel could be constitutionally tried applying the Civil burden of preponderence as to the Penal Law Act of Sexual abuse in the third degree pl 130.55; Sexual abuse in the Second degree (PL Sec. 130.60) and sexual abuse in the first degree (PL Sec 130.65) with the resultant disposition of banishment from his home and family for an indeterminate period of time which the Appellate Division Second Department characterized as:

> which prohibited him from living in the same household with the child unless

> prior application is made in Family Court (see Appendix A)

There is no question that the burden of proof applied by the Family Court was preponderance as contrasted to clear and convincing:

A. The Family Court Fact Finding Decision, needs:

> Although the Family Court Act refers to specific Penal Law sex offenses in defining the sexually abused child, abuse proceedings in Family Court are Civil not Criminal, in nature. Because the accused peneat is not subject to criminal sanctions in Famiy Court a finding of sexual abuse need only be based on a preponderence of the evidence (Fgm CT Act 1046...)

B. The Appellate Division Second Department reviewed the record below applying the Civil preponderance standard.

It is submitted by petitioner In light of the disposition that New York States use of the preponderance standard where the findings deal with substantive criminal changes which barred him from living with his family violates his rights to liberty and due process under the fourteenth amendment.

Petitioner believes that when this court examines the substantive impact upon him it will agree that the State of New York in its Courts has applied a constitutionally in firm burden and that this is a proper case for this court to review the conduct of the State of New York admeasured against the due process clause of the fourteenth amendment

see *Santosky v. Kramer* 455 U.S. 745 (1982), *Lehn v. Robertson* 463 U.S. 248 (1983).

It is submitted by Petitioner that the interests involved in the manner he was treated in the Family Court can well equate to interests that this Court has in the past found must be tried on a higher burden than mere preponderence such as Civil deposition proceedings as in *Woodby v. AS* 385 U.S. 276 (1986) and denationalization proceedings such as *Chaunt v. United State* 364 U.S. 350 (1960) or as in the welfare benefits case of *Mathews v. Eldrige* 424 U.S. 319 (1976) or the Civil commitment case of *Addington v. Texas* 441 U.S. 418 (1979)

Petitioner further asks that this Court view the consequence of deprivation of Family in the terms of the prohibition of cruel and unusual punishment which should not be allowed to be imposed on the civil preponderence standard. See *Trop v. Dalles* 356 U.S. 86 (1958)

2. Petitioner was deprived of fundamental due process procedures and devices which would have been necessary for an effctive defense and was even deprived of the effective process necessary for cross examination.

In upholding the Family Court's orders and findings the Appellate Division observed that Petitioner failed to testify or present evidence (see Appendix A)

In putting forth this observation the Court ignored and failed to address Rashmi P's position that:

> THE PROSECUTOR FAILED TO PROVIDE STATEMENTS OF THE INFANT PETITIONER AND FAILED TO PROVIDE EXCULPATORY INFORMATION

There is no question that the Commissioner and the Law Guardian knew that there existed materials in the

possesion of the validator of an exculpatory nature that should have been disclosed to the accused pursuant to *Brady v. Maryland* 373 U.S. 83 (1963) and that the absence of such disclosure severely impaired effective cross examination of the validator.

Clearly the Family Court was at all times aware from the testimony of the validator that there existed contemporaneous raw notes* and tape recordings of the two sessions of some two hours duration which the validator had conducted with Parul:

The Court: Dr. Lweiltes, let me ask you this, the entire interview you had with Parul on February 2nd and 9th.

The Witness: February 9th Your Honor

The Court: Were those two interviews all taped recorded from begining to end?

The Witness: 99.9 Yes Your Honor (Tr. 28 February 28, 1989)

Although trial counsel requests the Court's assistance in having the validator produce the tapes for the next session the court declines the application This denial in the circumstances should be viewed as an abuse of discretion see *Newman v. Silver* 553 Fed. Supp. 485 (S.D.N.Y. 1982) affirmed in part and modified in part 713F2d 14 (2nd Cir 1983).

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* The contents of the raw notes of the validator were not provided to trial counsel until after the trial had been completed at which time trial counsel receives in the mail copies of the raw notes from a Supreme Court Justice. Before the Appellate Division Counsel attempted to bring the notes before the Court but the Court rejected the motion and refused to enlarge the record.

## THE ACCUSED IS DENIED A TIME FRAME IN BOTH THE PETITION AND BILL OF PARTICULARS AND IS DENIED THE PROCEDURAL DEVICES THAT WOULD HAVE BEEN NECESSARY TO PRESENT AN EFFECTIVE DEFENSE

When Petitioner was indicted in the Supreme Court there was no difficulty for the District Attorney to elicit a time frame that the sexual abuse took place at the time when Parul is in New York and the accused father and wife are in India. The thereapist used by the District Attorney was able to pin point this because of Parul's birthday and the fact the acts took place within days after same.

But such particular time frame is not made available in the Family Court on the plea that the child is of tender years.

Furthermore, the Court elected to ignore all motions by the petitioner to the effect that the witnesses that petitioner would call as part of his defense resided in India and Pennsylvania and the Court repeatedly ignored all requests for commissions and depositions. The Court further ignored any request for a Gajarti interpreter which would have been necessary for petitioners witnesses.

In the brief filed before the Appellate Division counse for Rashmi P in a final footnote clearly set forth what occurred at trial as related to the intention of presenting a defense:

> "On February 23, 1990 at Tr 68 I have 15 to 20 witnesses
>
> On April 19, 1990 at Tr 9 Defense would call child

> On May 21, 1990 Tr 18 application for Gajarti interpretor which application was wholly ignored by court.
>
> On June 4, 1990 Tr 29 Application is made for Letters of Commission to take deposition on written questions in India and Pennsylvania - Again the request is ignored by the Court.

Petitioner requests that this Court understand that without the aforedescribed instruments of presentation including the lack of any time frame in the accusatory instrument and the subsequent bill of particulars it would have been a futile exercise to attempt to present a defense. Moreover, had petitioner under New York Law attempted to defend he may well have waived his rights to complain of the defects see *People v. Kalzen* 155 AD 2nd 882, 547 N.Y.S. 2d 716 (4th Dept. 1989)

## CONCLUSION

The adjudication of guilt on the substantive criminal charges leading to the deprivation of family and the stigma attached thereto is a severe consequence that should be likened to a Criminal Conviction save for the prison cell. In these terms petitioner requests that this Court find sufficient grounds to review what he deems imperimissible treatment in terms of the protections found in the 14th amendment of the United States Constitution. For these reasons, a writ of certionari should be issued to review the opinion and orders of the Courts of the State of New York.

Respectfully submitted,

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## APPENDIX A

## SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

_____AD2d_____ Submitted June 23, 1992

GUY JAMES MANGANO, P.J.
ALBERT M. ROSENBLATT
DAVID S. RITTER
JOHN COPERTINO, JJ.

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91-01602
91-00484

In the Matter of Parul P. (Anonymous). Rashmi P. (Anonymous), appellant; Commissioner of Social Services, respondent.

DECISION & ORDER

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Katz and Ricci, Rego Park, N.Y. (Robert A. Katz of counsel), for appellant.

O. Peter Sherwood, Corporation Counsel, New York, N.Y. (Pamela Seider Dolgow and Patrick L. Taylor of counsel), for respondent.

In a child protective proceeding pursuant to Family Court Act article 10, the father appeals from (1) a fact-finding order of the Family Court, Queens County (Kaufmann, J.), dated October 12, 1990, which, after a hearing, found that he had sexually abused his daughter, and (2) an order of disposition of the same court, dated January 17, 1991, which, *inter alia*, prohibited him from

living in the same household with the child "unless prior application to do so is made in the Family Court", and directed that his visitation with the child be supervised by the mother.

ORDERED that the appeal from the order dated October 12, 1990, is dismissed, without costs or disbursements, as that order was superseded by the order of disposition dated January 17, 1991; and it is further,

ORDERED that the order of disposition dated January 17, 1991, is affirmed, without costs or disbursements.

Following a fact-finding hearing, the Family Court determined that the appellant had sexually abused his daughter Parul. The appellant now contends that the court's finding of abuse was against the weight of the evidence presented at the hearing. We disagree.

At the fact-finding hearing a social worker from the child's school and a caseworker assigned to investigate the allegations of abuse each testified to out-of-court statements made by the child detailing the sexual abuse by her father. Each of the child's accounts of the abuse were consistent with one another. Further, a psychologist qualified as an expert in clinical psychology, therapy, and child sexual abuse testified that the child repeated these allegations to him and that her statements, and behavior, were consistent with the five stages of the inter-familial, child sex-abuse syndrome. The validating evidence of the psychlogist constituted sufficient corroboration of the child's statement to support the court's finding (*see Matter of Latisha V.*, 175 AD2d 839; *Matter of Linda K.*, 132 AD2d 149). The appellant did not testify in his own behalf and did not present any evidence. On this record, we find that that the

court's finding of abuse by the father was supported by a perponderance of the evidence (*see* Family Ct Act § 1046[b][i]).

We have considered the appellant's remaining arguments and find them to be without merit.

MANGANO, PJ., ROSENBLATT, RITTER and COPERTINO, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

## APPENDIX B

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK : COUNTY OF QUEENS

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| | |
|---|---|
| In the Matter of | Docket No. Na 3330/89 |
| PARUL PATEL, | |
| A Child Under Eighteen Years of Age, Alleged to be Abused by | DECISION AND OPINION |
| RASHMI PATEL, Respondent. | |

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APPEARANCES:

| | |
|---|---|
| Attorney for Petitioner Commissioner of Social Services: | **Martha L. Kovel, Esq.** Special Asst. Corp. Counsel Queens County Family Court 89-14 Parsons Blvd. Jamaica, NY 11432 |
| Attorney for Respondent: | **Michael V. Ricci, Esq.** 11-01 154th Street Whitestone, NY 11357 |
| Law Guardian for the Child: | **Deborah Williams, Esq.** The Legal Aid Society 94-04 161st Street Jamaica, NY 11432 |

**KAUFMANN, J.:**

Petitioner, Commissioner of Social Services, commenced this child abuse proceeding under article 10 of the Family Court Act, by petition dated April 14, 1989, alleging that respondent father sexually abused his daughter Paula by subjecting her to sexual contact on several occasions.

Prior to the commencement of this proceeding, the child, Parul, lived with her mother and respondent-father in an apartment in Queens County. After the petition was filed, I released Parul to her mother's custody on condition that Parul's mother enforce a protective order prohibiting respondent from residing in the home or having contact with Parul.

Thereafter, a fact-finding hearing was conducted. Three witnesses testified: Geraldine Gelber, a school social worker; Faith Housin, a caseworker for the Commissioner of Social Services; and Dr. Don J. Lewittes, an expert in child sexual abuse ("validator"). [1]

The petitioner also called Parul to the witness stand to give eivdence. Her law guardian made application that Parul testify *in camera*. When respondent objected to the application, I questioned Parul in the courtroom about her capacity to understand the proceedings. Parul appeared frightened and began to cry. In light of her distress, I

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[1]In the broadest sense, a validator is any person authorized to investigate a reported case of child sexual abuse to determine if the complaint is valid: that is, did sexual abuse of the target child actually occur or not? In a narrower sense, as the term is used by courts, a validator is an expert who "confirms or fails to confirm the existence of intrafamilial child sexual abuse syndrome and determines the existence of post-traumatic stress, from a cluster of behaviors". (*Matter of Linda K.*, 132 A.D.2d149, 158).

suggested that she be examined by a mental health professional to determine whether she could testify in some manner without suffering emotional trauma.

When the hearing resumed on the adjourned date, petitioner did not call Parul to give testimony. Instead, petitioner called Dr. Lewittes as a final witness. Respondent, too, decided not to call Parul as a witness.

Respondent neither testified in his own behalf nor called any other witness to testify in his behalf at the hearing.

I.

The following evidence was adduced.

On April 6, 1990, Parul's third grade class at P.S.-139 viewed an educationl file about sexual abuse. At the conclusion of the film, a teacher asked the class whether "anyone . . . touched you anywhere that you are not supposed to be touched." Parul told her teacher and the school principal, in response, that she had been touched by her father. The school principal immediately referred Parul to Geraldine Gelber, the school's social worker.

Ms. Gelber brought Parul to her office that same day, April 6, 1990. Parul told Ms. Gelber that in the morning, after her mother had left for work, "there were occasions . . . when her father was home . . . he asked her to come into his bed...." "She said that her father asked her to hold his penis and that he would at the same time touch her on the bottom." At times, she said, her uncle, who lived with the family, was at home, "and she was happy when he

was home because her father would not ask her to come into his bed".

Ms. Gelber reported Parul's allegations to the State Central Registry in Albany on April 6. She also telephoned Parul's mother and asked that both parents come to see her at school on April 7.

The State Department of Social Services alerted the Queens Field Office of the Commissioner to the report of suspected child abuse, and Parul's case was referred to caseworker Faith Housin. On the evening of April 6, 1990, she visited the Patel residence and spoke with Parul alone in the living room. Parul told her that, in 1988, her father "had held her hand and forced her to touch his penis . . . after her mother [had] left for work." She said that this occurred in the bedroom when she had night clothes on, and that these incidents ceased after she told her father "to stop or else she would tell her mother".

On the morning of April 7, Mrs. Patel went to school to speak with Ms. Gelber. They discussed Parul's allegations. An hour later, respondent also went to school to speak with Ms. Gelber. He told her that "what Parul had said to her was true." "He said he was not happy . . . about what had happened. That he loves his family very much. That he didn't want to have any problems." He asked her not to report what Parul had said, and told her "it hadn't happened in awhile." She informed him that she had already reported Parul's allegations to the authorities.

Ms. Gelber then spoke with Parul again, and told her what she had discussed with her parents. Parul told Ms. Gelber that she had wanted her mother to know about what

her father had done to her, but hadn't wanted to tell her mother herself. Parul also told her that an apartment building superintendent, who was a friend of her father, "had been accused of touching . . . one of the children in the building." Aware that Parul was being questioned by child protective workers, Ms. Gelber did not question Parul further.

In June, 1989, Parul repeated the allegations of sexual abuse against her father to Ms. Housin. She told Ms. Gelber, however, that she had been sexually molested by the apartment building superintendent.

In February, 1990, approximately two and a half months after Parul cried during questioning in the courtroom, she was interviewed by Dr. Don J. Lewittes. Dr. Lewittes did not interview Mrs. Patel because she declined to be interviewed (Respondent has also declined to be interviewed by Dr. Lewittes).

Dr. Lewittes was aware that Parul had alleged that she had been sexually abused by her father. He was not aware that she had also told Ms. Gelber that she had been sexually molested by the building superintendent.

At his first interview with Parul, Dr. Lewittes assessed her cognitive development, her ability to recall events, her ability to distinguish "good touch" from "bad touch", and her ability to differentiate truth from falsehood. Parul's cognitive development, he found, was consistent with her age (nine at the time of the interviews). She was able to remember personally significant memories. She knew the difference between appropriate and inappropriate "touching". She was clearly able to distinguish truth from

falsehood and fact from fiction.

When Dr.Lewittes questioned Parul about the allegations, she told him "she had said that [her father] had taken her hand and placed it on his penis, and . . . taken his hand and placed it on her . . . butt." She said that "she believed that her initial allegations were not real . . . that what she had initially alleged was . . . a product of a dream...".

When Dr. Lewittes asked Parul how she had determined that the initial allegations were "dreams", she said that she had been convinced that the allegations were real for more than a year, had been afraid to tell her mother about her father's actions, had finally felt a need to reveal her father's actions at school, and thereafter had consistently "told people what she believed to be a truthful story of the events that had occurred . . . with her father" until she went to a court hearing. "[F]ollowing the court hearing . . . she decided that what she reported was really a dream." Parul said that she was frightened of court proceedings. She also said that she felt responsible for the break-up of her family, was upset that her father had been removed from her home, and was afraid that her father might go to jail.

Dr. Lewittes asked Parul if she could remember details about "the dreams". Parul was able to remember that her father had put her "right" hand on his penis; that his hand touched her skin under her nightgown; that his finger was not inserted into her anus; and that she had been in bed in the morning after her mother left for work when her father did "these things" to her.

Parul told Dr. Lewittes that "these things" upset her very much; she didn't "enjoy it". She had asked herself how her father, who she loved, could have done "these things" to her. She was sad, became anxious, and had obsessive thoughts about what her father had done. She felt the need to disclose "these things" because she was so upset. "She couldn't stop herself from thinking about the fact [her father] had touched her" in this manner.

Dr. Lewittes found Parul to be anxious, depressed and very upset. She suffered from post-traumatic stress disorder. After assessing Parul's behavior, and the information elicited from her and received from others, within a scientific conceptual framework for child sexual abuse, he concluded that Parul's case is consistent with that of other children identified as victims of child sexual abuse by a family member (intrafamilial child sexual abuse).

Parul "talked about the dreaming as a general way of incorporating all the other details she had spoken about as her initial allegations." Dr. Lewittes found this to be inconsistent with how children discuss their dreams. Moreover, Parul's ability to remember specific details about her "dreams" was also inconsistent with a concluusion that the events she described could have been memories of dreams.

Dr. Lewittes concluded that Parul had made a "decision" to retract her allegations that her father had sexually abused her following a particularly frightening court appearance. She was upset by the court proceedings, he found, and also wished to reunite her family and make certain her father did not go to jail. Parul's "decision" that

"it was all a dream", Dr. Lewittes testified, is consistent in this case with the "suppression stage"[2] of the intrafamilial child sexual abuse syndrome. This stage of the syndrome, he stated, occurs when the consequences of disclosing the abuse lead the child to conclude that the only way to reunite the family, protect a loved relative, and ward off questioning by agencies and courts is to "retract" the allegations. The child, he said, often feels "emotionally" compelled to recant" the allegations. Often, there is also pressure from family members on the child to "recant". The child is made to feel that if he or she "would only take back [his or her] allegations then the family could [be reunited], the outside intervention agencies [would] go away, [and] the outside legal consequences [would] end...." "[I]ndeed, children . . . more typically than not will take back . . . their original allegations and come up with some form of recantation and retraction...."

Dr. Lewittes was apprised of Parul's allegation against the building superintendent while he was testifying at the fact-finding hearing. This additional information did not alter his conclusion that Parul's case is consistent with the cases of other child victims of intrafamilial sexual abuse. Parul's symptoms, he stated, are clearly consistent with the symptoms of children who have been sexually abused by a stranger (extrafamilial child sexual abuse).

Dr. Lewittes explained that the symptoms of child victims of intrafamilial sexual abuse are markedly different

---

[2]The dynamics of sexual encounters between adults and children usually fall within a predictable pattern. This is particularly true of those cases of intrafamilial child sexual abuse that come to light and are reporred. The activity usually occurs in five separate phases: the engagement phase; the sexual interaction phase; the secrecy phase; the disclosure phase; and often a suppression phase following disclosure. (Sgroi, Handbook of Clinical Intervention in Child Sexual Abuse at 12 [1982]).

from the symptoms of child victims of extrafamilial sexual abuse. He stated, for example, that child victims of extrafamilial sexual abuse might "repress" the abuse but would not exhibit symptoms associated with the "suppression stage" of intrafamilial child sexual abuse. Thus, child victims of extrafamilial sexual abuse would not recant the allegations to reunite the family and protect a loved family member from going to jail.

## II.

An "abused child", as relevant to this proceeding, is a child less than eighteen years of age whose parent "commits . . . a sex offense against such child, as defined in the penal law...." (Fam. Ct. Act § 1012[e][iii]). If the Family Court makes a finding of abuse, "it shall make a further finding of the specific sex offense as defined in article one hundred thirty of the penal law." (Fam. Ct. Act § 1051[e]).

Although the Family Court Act refers to specific penal law sex offenses in defining the sexually abused child, abuse proceedings in Family Court are civil, not criminal, in nature. Because the accused parent is not subject to criminal sanctions in Family Court, a finding of sexual abuse need only be based on a preponderance of the evidence (Fam Ct. Act § 1046; *Matter of Tammie Z.*, 66 N.Y.2d 1); an inference may be drawn against the accused parent who fails to testify (*Commissioner of Social Services v. Philip De G.*, 59 N.Y.2d 137); and unsworn out-of-court statements of the child, although hearsay, may be received in evidence (Fam. Ct. Act § 1046[a][vi]). If properly corroborated by other evidence tending to support their reliability, out-of-court statements of the child victim will support a finding of sexual abuse (Fam. Ct. Act § 1046(a)(vi); *Matter of Nicole V.*, 71 N.Y.2d 112, *reconsideration denied* 71 N.Y.2d 890).

The child's out-of-court statements may be corroborated by "[a]ny other evidence tending to support" their reliability (Fam. Ct. Act § 1046[a][vi]). One form of legally sufficient corroboration is expert testimony that a child shares the psychological and behavioral characteristics and reactions typically shared by other child victims of sexual abuse in a family setting (*Matter of Nicole V., supra*).

Because of the importance of a finding of sexual abuse for both the child and the alleged abuser, courts require experts providing such "validation" testimony to be highly qualified (*Matter of E.M.*, 137 Misc.2d 197). Of course, in the final analysis, the Family Court must always determine whether the child's out-of-court statements have been reliably corroborated and whether the evidence as a whole supports a finding of sexual abuse (*Matter of Nicole V.*, 71 N.Y.2d 112, 119, *supra*).

Applying these concepts to the evidence, I conclude that Parul is an "abused child" within the meaning of Family Court Act Section 1012(e)(iii).

Parul made out-of-court statements that her father had sexually abused her to her teacher, her principal, Ms. Gelber and Ms. Housin. Those initial statements were consistent (*see Matter of Starr H.*, 156 A.D.2d 1024), and were made before she was under pressure to recant. There is no suggestion of any motive on her part to falsely accuse her father (*Cf. Matter of Kimberly X.*, 133 A.D.2d 226 [evidence that child fabricated statements because of problems she was having at home and out of a desire to protect her natural father]). Nor is there any evidence that Parul is psychologically disturbed (*Cf. Matter of Linda E.*, 143 A.D.2d 904, *app den* 69 N.Y.2d 613 [child suffered from an undersocialized conduct disorder, evidenced in part by an excessive and precocious sexual preoccupation]), or that her parents are involved in a custody battle (*CF. Matter of Smith*, 128 A.D.2d 784 [sexual abuse allegations made

during pendency of volatile divorce proceedings]; *see* A. Rosenfeld, C. Nadelson & M. Krieger, *Fantasy and Reality in Patients Reports of Incest*, 40 J. Clin. Psychiatry 159 [1979]).

Parul's initially consistent out-of-court statements were persuasively corroborated by the expert "validation" testimony of Dr. Lewittes, who is an expert with the requisite ability to interpret behavior and information elicited from interviews within a conceptual framework for child sexual abuse. He was able to conclude that Parul's case is consistent with other cases of child victims of intrafamilial sexual abuse. After careful evaluation, he was able to discount Parul's statements that a superintendent molested her and that her original allegations were "dreams". These belated assertions by Parul, he concluded, are consistent with the "suppression stage" of the intrafamilial child sexual abuse syndrome. This stage of the syndrome, he testified, occurs when both inward pressure from the child and outward pressure from family members cause the child victim to "recant" the original allegations in order to reunite the family, protect a loved parent, and eliminate the fear and embarrassement associated with the intervention of outside agencies and the courts.

Dr. Lewittes' conclusions comport with clinical and scientific literature, which makes clear that many sexually abused children recant their original allegations (Myers, Bays, Becker, Berliner, Corwin & Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1 (1989); Sgroi, Handbook of Clinical Intervention in Child Sexual Abuse at 24-27 [1982]). This happens so frequently that experts now consider recantation one aspect of the child sexual abuse syndrome (Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect 177 [1983]).

Children do fantasize and dream, but a true allegation of sexual abuse can almost always be

differentiated from a fantasy or dream by the explicitness of the assertion of what has taken place. When the allegation is real, the child can describe the specific context in which the sexual abuse occurred and the specific sexual acts. Dreams or fantasies, in contrast, do not have an explicit sexual context. In addition, the child perceives sexual dreams and fantasies as desired events and experiences (K. Faller, Child Sexual Abuse: An Interdisciplinary Manual for Diagnosis, Case Management and Treatment 5-6 and 133-134 [1988]). Thus, the explicitness of the child's account and the child's emotional reaction to the event indicate whether the reported event is reality or fantasy.

The child's age must also be considered by a "validator", since it is difficult for a child with an actual or cognitive age under seven years to separate reality from fantasy (*see* 40 J. Clin. Psychiatry, *supra*, at 161).

Dr. Lewittes carefully determined that Parul was actually and cognitively able to clearly distinguish dreams from reality. Parul described events of sexual abuse to him in explicit detail. The described events upset her very much. He could, therefore, credibly conclude, as he did, that Parul's original out-of-court statements were real events, not childhood fantasies or dreams.

Dr. Lewittes also credibly discounted Parul's assertion that she was molested by the buildinig superintendent. This belated assertion, he explained, was made by Parul after she had been separated from her father, and after she experienced internal and, perhapos, external pressure to recant.

Moreover, a child who has been molested by a stranger (such as the building superintendent) would be unlikely, as Parul did, to keep the incidents a secret for more than a year. Instead, the child molested by a stranger would be likely to immediately report the incidents to parents. They, in turn, would likely react appropriately by calling the police (*see* K. Faller, *supra*, at 56).

Finally, Parul's initially consistent out-of-court statements are also corroborated by respondent's statements to Ms. Gelber on April 7. While somewhat ambiguous, these statements provide additional assurance that Parul's out-of-court statements are reliable, and that the evidence as a whole supports a finding of sexual abuse.

Accordingly, I now make the findings required by Family Court Act § 1051(e). I find that respondent committed the following specific sex offenses against his daughter: Sexual abuse in the third degree (PL § 130.55); Sexual abuse in the second degree (PL § 130.60); and Sexual abuse in the first degree (PL § 130.65).

The petitioner is directed to prepare an Investigation and Report. The Mental Health Service is directed to prepare a full evaluation, including interviews with both parents and the child. The attorneys and respondent are directed to appear for disposition on November 21, 1990.

This constitutes the opinion, decision and order of the court.

ENTER

_____

Edward M. Kaufmann
Judge of the Family Court

Dated: October 12, 1990

## APPENDIX B1

PRESENT: EDWARD M. KAUFMANN

At a term of the Family Court of the State of New York, held in and for the County of Queens at 60 Lafayette Street New York, on January 17, 1991.

CSS o/b/o
In the Matter of PARUL PATEL
(A) Child under 18 Years of Age
Alleged to be (Abused) by
RASHIMI PATEL
Respondent.

Docket No. Na 3330/89

ORDER OF DISPOSITION
(Child Abuse)

The petition of C.S.S. under Article 10 of the Family Court Act, sworn to on April 14, 1989, having been filed in this Court, alleging that the above named child is an abused child, and that Rashmi Patel is the parent of said child and

The matter having thereafter duly come on for a dispositional hearing before this Court, and the Court after having made an examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions, and capacities of the persons involved:

and it appearing that the need for placement of the child would be eliminated by the issuance of an order of protection directing the removal of Rashimi Patel from the child's residence.

NOW therefore, upon findings made in the fact-finding order dated October 16, 1990, and in the dispositional hearing herein and upon all proceedings had

herein, namely: (State grounds for disposition, including those pertaining to preventive services efforts.) Statement of the Court read into the record on 1/17/91; it is hereby

(ORDERED that during the period of the aforesaid order of protection, the custody of the child(ren) be and the same hereby is awarded to Mother, Auila Patelk;)

(ORDERED that the (parent(s) ) (person(s) legally responsible for the care) of the child comply with the terms and conditions specified in the order of protection annexed to this order and made a part hereof;) (and it is further)

(ORDERED child Parul Patel is released to the custody of her mother Order of Protection annexed hereto and made a part hereof.

Any subsequent adjudication of child abuse or finding of a felony sex offense as defined in sections 130-25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65 and 130.70 of the Penal Law may result in the committment of the guardianship and custody of the child, or another child, pursuant to section 384.6 of the social services law.

ENTER:

_____

J.F.C.
Edward M. Kaufmann

Dated: January 17, 1991

## APPENDIX C

## SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
ALBERT M. ROSENBLATT
DAVID S. RITTER
JOHN COPERTINO, JJ.

DECISION & ORDER
ON MOTION

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91-00484, 91-01602

In the Matter of Parul P. (Anonymous).
Rahsmi P. (Anonymous), appellant;
Commissioner of Social Services, appellant.

---

Motion by the appellant for reargument of appeals from two orders of the Family Court, Queens County, dated October 12, 1990, and January 17, 1991, respectively, which were determined by decsion and order of this court dated August 31, 1992, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MANGANO, P.J., ROSENBLATT, RITTER and COPERTINO, JJ., Concur.

ENTER:

Martin J. Brownstein
Clerk

February 1, 1993

MATTER OF P. (ANONYMOUS), PARUL

## APPENDIX D

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of July 1993

**PRESENT,** HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-10 Mo. No. 356
In the Matter of Parul P.
(Anonymous).

Rashmi P. (Anonymous),
Appellant;
Commissioner of Social Services,
Respondent.

---

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Donald M. Sheraw
Clerk of the Court

## APPENDIX E

MICHAEL VINCENT RICCI
Attorney At Law
11-01 154th Street
Whitestone, N.Y. 11357
Tel. 718-767-2230

August 31, 1990

Honorable Edward Kaufman
Manhattan Family Court
60 Lafayette Street
New York, NY 10013

Re: Family Court: Patel (Respondent)
Docket No. Na 3330/89
Supreme Court: Patel (Defendant)
Ind. No. 2280/89

Honorable Edward Kaufman:

1. *Honorable Joseph Calabretta (Supreme Court Judge) Findings*

A. Please find enclosed copy of transcripts for August 21 and August 22, 1990 before the Hon. Joseph Calabretta, a Judge of the *Supreme* Court for the matter of People v. Patel, Inc. #2280/89.

Counsel directs this *Family* Court's attention to the August 22, 1990 transcript pages 3, 4 and 5:

> "When counsel were instructed to proceed to trial and send for a jury, which had been empanelled and ready to be sent to this part, I called for a side bar conference

attended to by both counsel. During that conference, it appeared to the Court that there was a good possibility that, based upon the representation by defense counsel, that this defendant was not in the country during the period alleged in the indictment.

MR. RICCI: Excuse me, alleged in the Bill of Particulars and in the Grand Jury and August 31st, written order of Judge Kenneth Brown which was April 1st to April 7th, 1988.

THE COURT: Including those dates.

The Court directed counsel to produce this morning a passport which would document this defendant's absence from this country during that period of time. This morning, in compliance with that direction, counsel did produce a passport which the passport carefully inspected and reviewed and the Court, to all intents and purposes and appearances, believes it to be a valid passport. That passport shows that this defendant arrived in India on March 23, 1988 and arrived--returned to New York arriving here in New York on April 8, 1988.

I am prepared to meet my commitment made to counsel yesterday upon the production of the passport to discuss the dismissal of this indictment with the Bureau Chief, Ms. Alice Vachss, I am

now informed by Assistant District Attorney Myrill, that Ms. Vachss is on vacation and not scheduled to return until Monday, August 27th. Ordinarily, this matter would and should be sent back to the originating part because actually, this case is not ready for trial at this moment. However, in view of the promise that I made counsel, that I would, if satisfied that the passport was a legal, valid one, that I would make every diligent effort to seek a dismissal of the indictment in the interest of justice. However, since Ms. Vachss is the Bureau Chief and presently on vacation, I can't do that until Monday morning. I have discussed this matter with defense counsel, he would prefer that the matter remain here, in view of the fact that I have made that promise to him and I certainly then will keep it here and persue that course.

Is there anything further you wish to say?

MS. MYRILL: Yes, Judge. I need a copy of the passport from Mr. Ricci.

THE COURT: Mr. Ricci will make that available.

MR. RICCI: I will make that available.

THE COURT: Let the record indicate he is now turning over a copy of the passport.

B. The personnel (or agents) in Family Court (including but not limited to: Martha Kovel (Petitioner's attorney), Deborah Williams (Fiduciary to child), Don J. Lewittes, Faith Hausen) all knew that my client, Rashmi Patel, was in India (as found by the Hon. Joseph Calabretta, *supra*) during the events in the United States. They were all given this information by the child herself, the mother, and by counsel especially on June 4, 1990 during the 2 hour off the record conference in chambers with your Honor present-after which your Honor physically had counsel thrown out of the courtroom after Petitioner's attorney (Ms. Kovel) and the Fiduuciary (Ms. Williams) objected to my introduction pursuant to CPLR 4518 of certified Hospital Records which had been subpoened by Ms. Kovel (So Ordered by Hon. E. Kaufman).

2. *Dismissal* (Ind. #2280/89)

On August 30, 1990, the case vs. Patel Ind. #2280/89 was dismissed in the Supreme Court.

3. *"Dreams"*

A. It has now come to my attention from a source from the Petitioner's side, through Supreme Court channels, that the child "stated to attorney" [i.e. Ms. Kovel and/or Ms. Williams] and "Case Worker" [i.e. Faith Hausen] that with reference to the father it was "a dream". This was *before* her interview with the "alleged" expect Don J. Lewittes.

B. During her interviews with this *"alleged"* expect Don J. Lewittes the child in her own handwriting wrote:

"I THOUGHT THAT HE DID SOMETHING IN MY PRIVATE BUT IT WAS A DREAM".

C. During these interviews with this "alleged" expert Don J. Lewittes the child said

"he put his hand on *his* butt"

All of the above Re "Dreams" was within the actual or imputed knowledge of Petitioner's attorney (Ms. Kovel), case worker (Faith Hausen), FIduciary (Ms. Williams ) *before* they presented the "alleged" expert Don J. Lewittes *sworn* testimony.

On the record all of the above was intentionally withheld from counsel and the Court notwithstanding Petitioner's and Fiduciary's legal and ethical obligations.

4. *Frank Superintendant*

Also, the child told the "alleged" expert Don J. Lewittes about "Frank Superintendent" *before* he gave his sworn testimony.

*Enter all Orders (Ex Parte or otherwise) and Send Copies*

In prior motions I requested that all orders of this Family Court be Entered and Copies sent to counsel. I renew my request.

*"60 Days" (CPLR 2219)*

After counsel was thrown out of the courtroom, *supra*, the fact finding was over on June 6, 1990. At that time, this Court promised a prompt written signed court order pursuant to CPLR 2219.

I still have not received said written signed order.
The child, mother, and father want to get on with

their lives.

Very truly yours,

Michael Vincent Ricci

MVR/ec
encs.

C/C CLERK
Queens Family Court
89-14 Parsons Blvd.
Jamaica, N.Y. 11432

C/C Human Resources Administration
Office of Legal Affairs
Commissioner of Social Services
220 Church Street
New York, N.Y. 10013

C/C Legal Aid Society
Juvenile Rights Division
90-04 161st Street
Jamaica, N.Y. 11432

# APPENDIX F



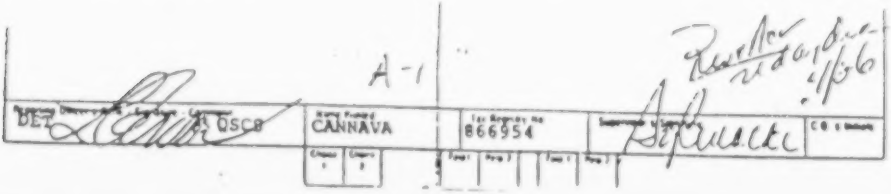
4/5/96 4/8/96 419 Queens Sex Crimes 2

Poveda Yvette

DETAILS
INVESTIGATE SEXUAL ABUSE
SUBJECT: CANVASS

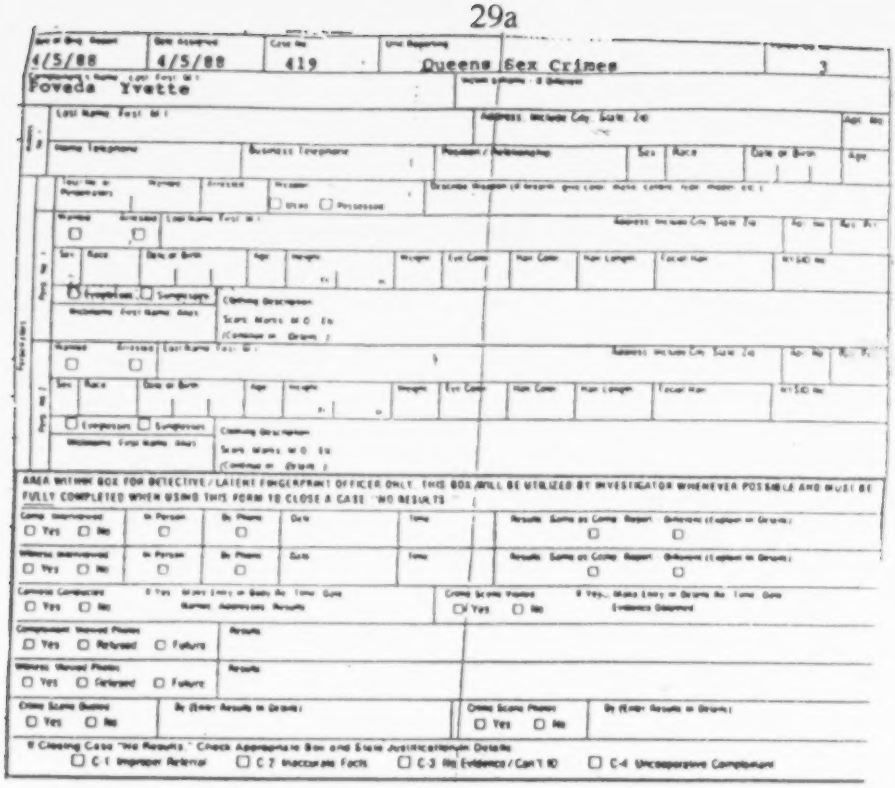
4. On this date the c/w mother and Ms. Marchun did respond to an apt unknown to the assigned at this time, to interview and a child who was baby sat by the subj. Upon getting to the apartment they found that the child mother and father were away in India and she was being taken care of by her grandmother. She did let the above two speak to the child and Ms. Marchun asked the child if the subj ever did anything to her and at that Point the child burst into tears. The assigned will get in touch with this child and her parents.

CASE ACTIVE



A-1

DET. DSCB CANNAVA 866954



| Date of Rpt. Report | Date Assigned | Case No. | Unit Reporting | |
|---|---|---|---|---|
| 4/5/88 | 4/5/88 | 419 | Queens Sex Crimes | 3 |

Complainant's Name (Last, First, M.I.): Poveda Yvette

INVESTIGATE: SODOMY
SUBJECT: REINTERVIEW C/W MOTHER

1. On Monday 4/11/88 at approx 1715 hrs. the assigned and Det Giardina did respond to. At that location the c/w mother stated to the assigned that her daughter had further stated to her that when the perp orally sodomized her he had put something that smelled like medicine on his tongue. The assigned at this time spoke with Mr. Rashmi the father of Patel the Indian girl that was supposedly abused by the subject also. He stated to the assigned that he was not sure if I wanted this daughter subjected to this at this time. He stated to the assigned that he would speak with his wife and come in to see the assigned on Wednesday morning at approx 0930 hrs to speak about his decision. The assigned at this time spoke with the c/w mother and told her that he was going to speak with the other girls father on Wednesday and at that time regardless of the results of the interview the subject would at this time be arrested if available.

"A-2"

| Reporting Officer | Name Printed | Tax Registry No. | Supervising Officer |
|---|---|---|---|
| DET [signature] DSCS | CANNAVA | 866954 | [signature] |

2. On this same date at approx 1830 hrs the assigned called up the legal bureau and spoke to a Lt Reisert and gave him the facts of the case and at this time told him that an answer could not be reached at the DA office. At this time the assigned was told by the above to make an arrest when ever ready.
CASE ACTIVE

## APPENDIX G

## FAMILY COURT OF THE STATE OF NEW YORK
## COUNTY OF QUEENS

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In the Matter of
Parul Patel b 3/31/80
A Child under Eighteen Years of
Age Alleged to be Abused by

Rashmi Patel
Respondnet(s)

---

Docket No. Na 3330/89

SUMMONS

CHILD ABUSE CASE

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK TO: Rashmi Patel, 89-75 Vanderveer Street

A petition under Article 10 of the Family Court Act having been filed in this court, alleging that Parul Patel is (are) an abused child _____, a copy of said petition being annexed hereto:

YOUR ARE HEREBY SUMMONED to appeal before this Court at

89-14 Parsons Boulevard

Jamaica, New York 11432

on April 24, 1989 at 9:30 o'clock in the forenoon of said day to answer the petition and to show cause why an order should not be entered adjuding the aforesaid child ____ to be an abused child _____ and why you should not be dealt with according to law. Further why an order for support under Sec. 233 of the Family Court Act should not be made if the final disposition is an order of placement.

ON YOUR FAILURE TO APPEAR as herein directed, a warrant may be issued for your arrest.

Dated: April 18, 1989

BY ORDER OF THE COURT

_____

Clerk of the Court

UNLESS THIS SUMMONS IS SERVED WITHIN TWO DAYS, RETURN IT TO THE CLERK FOR ISSUANCE OF A WARRANT

Secs. 1012, 1031 F.C.A.

FAMILY COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS

In the Matter of
PARUL PATEL b. 03/31/80
A child___under Eighteen Years
of Age Alleged to be Abused by
RASHMI PATEL - Father
Respondnet(s)

SSC Worker: F. HOUSEN
SSC NO. 4971401
Unit 977
Docket No. Na 3330/89
Petition
Child Abuse Case
Phone:
481-5886
THIS PROCEEDING COULD LEAD TO PROCEEDING FOR TERMINATION OF PARENTAL RIGHTS UNDER THE SOCIAL SERVICES LAW.

TO THE FAMILY COURT

The undersigned petitioner respectfully show that WILLIAM GRINKER, COMMISSIONER OF SOCIAL

SERVICES OF THE CITY OF NEW YORK BY: S. GLUCK/ V. THOMPSON/J. GUTHRIE/J. JORDAN

(1) Petitioner, who resides at 250 Church Street New York, NY is a person authorized to file a petition under ARTICLE 10 of the Family Court Act by reason of the fact that (he) (she) is a duly authorized representative for the Commissioner of Social Services

(2) PARUL PATEL
is a child under the age of eighteen years, having been born on 03/31/80

(3) Said child resides with AUILA PATEL
at 62-64 Saunder Street, Rego Park 11374

(4) The father of said child is RASHMI PATEL
who resides 89-75 Vanderveer Street

The mother of said child is AUILA PATEL
who resides at SAME AS #3

The person legally responsible for the care of said child is RASHMI PATEL who resides at SAME AS #4

(5) (Upon information and belief), said child is an abused child in that: (Specify grounds of child abuse under Section 1012 of the Family Court Act.)

FOR ALLEGATIONS SEE ADDENDUM

(6) By reason of the facts alleged in paragraph (5) said child is also a neglected child.

(7) (Upon information and belief) RASHMI PATEL
the FATHER
said chld, (is) (are) the person(s) who (is (are) responsible for the abuse (and neglect) of said child.

The Corporation Counsel of the City of New York is made a party hereto pursuant to Section 254 (b) of the Family Court Act.

WHEREFORE, Petitioner prays that an order be made determining the said PARUL PATEL
to be an abused child, or, in the alternative, a neglected child and otherwise dealing with said child in accordance with the provisions of Article 10 of the Family Court Act.

Dated: April 14, 1989

_____
Petitioner

VERIFICATION

STATE OF NEW YORK )
COUNTY OF QUEENS ) SS.:

S. GLUCK/V. THOMPSON/J. GUTHRIE/J.

JORDAN being duly sworn, says that I am the Petitioner in the foregoing petition; that said petition is true of my own knoweledge, except to those matters therein stated to be alleged upon information and belief and as to those matters, I believe it to be true.

_____

Petitioner

Sworn to before me, this
day of 14th 1989

_____

Notary Public
(Deputy) Clerk of the Court

Let (SUMMONS) ISSUE
(WARRANT)

Dated_____

**FAMILY COURT OF THE STATE OF NEW YORK**
**CITY OF NEW YORK-COUNTY OF QUEENS**

In the Matter of
PARUL PATEL

A child under Eighteen years
of Age Alleged to be Abused by

RASHMI PATEL - FATHER
Respondent(s)

DOCKET NO. _____

ADDENDUM

Parul Patel, born 03/31/80 is a child under the age of 18 years who is an abused child in that Rashmi Patel respondent father commits or allows to be committed a sex offense against such child, as defined in the penal law under sections 130.00 and 130.60 to wit:

1. On 04/01/89, 04/06/89, and 04/07/89 SSC received reports that on three occasions the respondent touched the child on the buttocks and had her fondle his penis. One report indicated that the respondent digitally molested the child's anus.

2. Respondent father admitted to touching the

child's buttocks and placing her hand on his penis on at least three occasions.

As a result of the foregoing, Parul Patel is an abused child.

(2)

No. 93-542

FILED
DEC - 1 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

In the Matter of

PARUL P.,

A Child Under Eighteen Years of Age Alleged to be Abused by RASHMI, P.,

Petitioner,

- against -

COMMISSIONER OF SOCIAL SERVICES,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT**

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December 1, 1993

BEST AVAILABLE COPY

## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. In this civil child protective proceeding under Article 10 of the New York Family Court Act, does the statutory requirement that a finding of abuse be based on a preponderance of the evidence, rather than on clear and convincing evidence, comport with due process, assuming the issue is preserved for review?

2. Did the state courts properly reject petitioner's claim that he was denied a fair trial?

3. Are the rules applicable to the definiteness of indictments, and under Brady v. Maryland, 373 U.S. 83 (1963), inapplicable to a civil proceeding pursuant to Article 10 of the Family Court Act?

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No. 93-542

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

In the Matter of

PARUL, P.,

A Child Under Eighteen Years of Age Alleged to be Abused by RASHMY, P.,

Petitioner,

- against -

COMMISSIONER OF SOCIAL SERVICES,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT**

## STATEMENT OF THE CASE

By petition dated April 14, 1989, the Commissioner of Social Services of the City of New York ("Commissioner") commenced this proceeding under Article 10 of the Family Court Act, alleging that

petitioner (respondent below) Rashmi P. committed or permitted sex offenses against his daughter Parul P. Specifically the petition states that

> 1. On 4/1/89, 4/6/89 and 4/7/89 SSC received reports that on three occasions the [petitioner] touched the child on the buttocks and had her fondle his penis. One report indicated that the [petitioner] digitally molested the child's anus.
>
> 2. [Petitioner] father admitted to touching the child's buttocks and placing her hand on the penis on at least three occasions.

At the time of the filing of the petition, Parul was nine years old.

Two of the reports referred to, DSS-2221 reports of suspected child abuse, were subsequently received in evidence as

Commissioner's Exhibits 1 and 2 (B7-14).[1] Parul's birth date is stated in both as March 31, 1980. In one, dated April 6, 1989, Mrs. G. Gelber, a member of the school staff, reported that "at least three times father has had child come into bed with him and hold his penis Fa[ther] has also fondled her buttocks. This occurs in the morning after mo[ther] has gone to work but before ch[ild] goes to school. Mo[ther] was unaware of Fa[ther's] actions."

---

[1] This appeal was perfected on the original record. Transcript citations preceded by "A" refer to pages of the hearing held on October 16, 1989; B: November 13, 1989; C: February 15, 1990 first transcript; D: February 15, 1990 separate "excerpt"; E: February 26, 1990; F: April 19, 1990; G: May 21, 1990; H: June 4, 1990; and I: June 6, 1990; J: January 17, 1991 (dispositional).

The second report, dated April 7, 1989, was made by Esperanza Ruiz-Diaz, a social worker at Elmhurst Hospital in Queens (Pet. Exh. 1; B9-12). It stated that

> Mo[ther] brought ch[ild] to Ped ER for exam due to FA[ther's] sex abuse of Parul, Fa[ther] digitally molested Parul in her anus and had her masturbate him to orgasm. This occurred on at least three occasions. Mo[ther] was at work and unaware.
>
> Mo[ther] is ambivalent about situation. Mo[ther] states she trusts her husband and states Fa[ther] "didn't really hurt her". By that, Mo[ther] meant ch[ild] was not penetrated vaginally.

Petitioner's counsel served a demand for a bill of particulars on the Commissioner. Counsel sought the "Exact date", the "Exact Time of day", the "Exact location address", the "Exact room in location", the identity of all

"person(s) present," and an "Exact Description of the alleged offense," for each "occasion of alleged abuse."

The Commissioner responded with a verified bill of particulars on June 30, 1989. In it, the Commissioner stated that the exact dates of the instances of abuse were not known "due to the tender years of the child." The Commissioner stated that although the "exact time of day is not known," the child had stated that "the incident occurred in the morning hours." The Commissioner also identified the location and room where the abuse occurred and detailed the nature of the abuse.

A fact-finding hearing commenced on October 16, 1989, and continued on November 13, 1989, and, in 1990, on February 15, February 26, April 19,

May 21, June 4, and June 6. The Commissioner called Geraldine Gelber, a school social worker; Faith Housen, a caseworker, and Dr. Don J. Lewittes, Ph.D., a validator. Petitioner did not testify nor did he call any witnesses on his behalf.

**Ms. Gelber** first spoke to the daughter, Parul, on April 6, 1989 (A2-3). Parul had been brought to her office to speak with her after she had disclosed several sexual incidents involving her father (A2-6).

Parul told Ms. Gelber that in the mornings, her mother, a nurse's aide, left for work very early (A5-6, A27-29, A34-35). On three or four occasions, Parul's father had asked Parul to come into his bed with him (A5-6, A27-29, A34-35). Petitioner had Parul hold his

penis, while he felt her "bottom" (id). Parul was happy when, as sometimes happened, an uncle stayed with them, because then her father would not do these things (A7).

Parul was upset in discussing these incidents (A6-7). Ms. Gelber did not discuss the incidents in detail with Parul because she did not want to put her through it, and Parul would be talking with the Bureau of Child Welfare (A5-9). Ms. Gelber understood the events to have taken place at least some months before, although children of that age, approximately nine years old, do not have a good sense of time (id.; A15-16, A34-35).[2] Parul had also mentioned another

---

[2] While petitioner wanted a more precise time designation, the court credited the Commissioner's representation that the (continued...)

incident in which a friend of her father's, the building superintendent, had done something with another child (A22).

Ms. Gelber called the Child Abuse Hotline and Mrs. P., Parul's mother. Although Ms. Gelber had asked both Mr. and Mrs. P. to see her the next day, only Mrs. P. showed up at first, and Ms. Gelber discussed the matter with her (A7-8).

---

[2] (...continued)
time given was as precise as possible, and advised petitioner's attorney that he could probe the time of the event on cross-examination, as in fact he was allowed to do fully. See A5-6, A38-41, A27-29, A16-21. The court also directed that petitioner's counsel be given access to the Department of Social Services' case file (A42-43) and petitioner has never claimed that that direction was not fully complied with.

About an hour after Mrs. P. left, Mr. P. came to see Ms. Gelber; Ms. Gelber knew it was Mr. P. because he identified himself then, but she also identified him at the hearing in court (A8-9). Petitioner said to her that "what had been said to me was true" (A8-9, A34-35). Parul's precise allegations were not discussed between them, and Ms. Gelber did not repeat to petitioner what Parul had told her, nonetheless, petitioner said that he was not happy that "it" happened, and asked Ms. Gelber not to report it because he was concerned about people at his job finding out (A9, A11). Petitioner also said that "it had not happened in a while and he was very sorry it happened," consistent with what Parul had said (A10-11).

That day or possibly the next, Ms. Gelber spoke with Parul again, telling her what she had said to the parents (A12-14). Parul said that she had wanted to tell her mother and wanted her to know, but had not wanted to tell her mother herself (A12).

Ms. Gelber then explained to Parul that someone would be coming to investigate and ask questions (A12).

Sometime later, when Parul had become more comfortable with her, Parul told Ms. Gelber that a friend of her father's, the building superintendent, had also done something to her: he had pushed her panties aside when she was wearing a dress, and put his tongue on her vagina (A14-15, A31-32).

**Faith Housen**, a caseworker, spoke with Parul in her home on April 6, the

same day the first report of suspected abuse was telephoned in (B7-B21).

Parul told her that a teacher at school had shown them a movie about being touched in areas where they are not supposed to be touched (B21-22). In response to the teacher's questions about whether the children had been touched, Parul told her teacher that "over a year ago", on three separate occasions, her father held her hand and forced her to touch his penis, in the morning, after her mother had gone to work (B21-22). It had happened in the bedroom, which when Ms. Housen saw it had Parul's bed right next to her father's (B22, B31-32). A cousin who sometimes stays with them stays in a separate room (B31-32). Parul said that petitioner had been wearing his pajamas, and Parul had been wearing her

nightgown (B21-22). The events occurred roughly a year before Parul talked with Ms. Housen, but Parul did not place the incidents with reference to birthdays or other reference days (B30-31). Ultimately, Parul told him that if he did not stop this, she was going to tell her mother, and petitioner did not do it after that (B22, B33, B37).

Ms. Housen had asked Parul whether she knew the difference between telling the truth and lying, and Parul had said that she did, and would not lie about this (B22-23).

Ms. Housen had had two interviews with Parul, one roughly 45 minutes long, the other 20 to 30 minutes long (B63). The interviews were consistent (id.).

Thereafter, on April 10, Ms. Housen received a telephone call from a man

identifying himself as petitioner, and asking if she was Ms. Housen (B40-B41). He then identified himself as Parul's father, Mr. Rashmi P. (B24-25, B40-41, B71-72). Ms. Housen asked him about the abuse report, and he admitted to her that, as she described, he had held Parul's hand to his penis on three occasions (B24-25, B27, B43-44). He said that he was sorry for what had occurred, and would be willing to cooperate with the caseworker and come in for an appointment (B27). It is true that the only way Ms. Housen knew it was petitioner was by what he said (B70-B71). Ms. Housen made a written note of the call in her case record (id.).

Petitioner told Ms. Housen that he had just been let out of jail (B27). She thought that the call occurred in the

morning (B27). However, she had also called someone else, Mr. P.'s brother, seeking temporary placement of Parul with a relative, on the same day and she thought that call was in the afternoon (B27-28, B73-79). Ms. Housen did not talk to petitioner again, because she subsequently learned that he had an attorney, and she thought she should not talk to petitioner directly (B27-28).

The Commissioner then called Parul herself, requesting with the law guardian that the child's testimony be taken in chambers, out of petitioner's presence (B79-85). Upon the objection of petitioner counsel, made after conferring with petitioner, the court denied the application that the testimony be taken outside of petitioner's presence, apparently because the law guardian had

not made it on written papers and no supporting evidence from a therapist had been presented (id.).

Accordingly, petitioner was in the courtroom when Parul was called to testify (B87-88). Parul was able to answer only by nodding her head, and nodded yes that she wanted her mother to stay in the courtroom too (B86). Parul nodded yes to the court's question whether she was scared in any way (B87). Parul then started crying (B88).

The court terminated the examination, and out of the mother and child's presence observed that Parul was "extremely frightened and began to cry" (B88).

The court suggested therapy, and requested a report on whether Parul could

testify without psychological damage if she were to be recalled (B89-B90).

Petitioner's counsel objected, stating that he thought that Parul had testified before in a criminal case against petitioner, but it appeared that that testimony had been on video (B90).

Petitioner's counsel also objected to Parul receiving any therapy, asserting, notwithstanding Parul's crying, that it was purely a delay-tactic (B91-92). The other counsel disputed that point, and based upon the law guardian's application the court ordered therapy before the child testified for the Commissioner (B95-B96).

After Parul was sent for therapy the Commissioner decided not to call the child to testify because it would be too traumatic for her (C3-C7, F5-6). When

petitioner complained that he wanted to cross-examine the child the Court left open to the possibility of petitioner subpoenaing Parul, subject to a motion to quash (C9-11).

The Commissioner called **Dr. Donald Lewittes**, who was subject to extensive voir dire by petitioner and the court (C12). Dr. Lewittes is licensed as a clinical psychologist in the State of New York. He has advanced training in the area of sexual abuse (C12-C13). At the time of the hearing, he was in private practice as a clinical psychologist.[3]

---

[3] Since receiving his Ph.D., he has been Chief Psychologist at South Nassau Community Hospital, the Project Director of the Nassau Coalition of Child Abuse and Neglect, and supervisor of a Justice Assistance Act grant to train professionals in investigating and understanding child sexual abuse (C13-14; C46-50). He has also served as a (continued...)

Dr. Lewittes had been treating sex-abused children since 1977 (C59). At the time of the hearing, he had seen well over 1000 patients; including 400-500 children, and over 100 children involved in allegations of child sexual abuse (C14).

Dr. Lewittes makes a diagnosis based upon what the child says, how the child behaves, and the child's emotional stance, assessing whether the child has the distinct characteristics consistent with children who have been determined to be sexually abused (C29-30, C40-41).

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[3] (...continued)
consultant to the Suffolk County Department of Social Services and the City Commissioner (C13). Dr. Lewittes has published papers in academic journals on the topics of human sexuality, pedophilia and child sex abuse (C20-21).

In interviewing a child, Dr. Lewittes does a brief cognitive assessment, and determines whether the child can understand the difference between truth and falsehood, reality and fantasies, and waking and sleeping (C52). He also assesses the child's intellectual development (id.). Dr. Lewittes obtains a history from the child and tries to obtain an understanding of the family dynamics (id.).

During the interview, Dr. Lewittes then tries to ascertain whether the child has symptoms or behavior consistent with post-traumatic stress syndrome, and in particular whether the child demonstrates the five phases, outlined by Dr. Sgroi, as a consistent pattern of behavior of children shown to be sexually abused, i.e., the engagement phase; the

intermission phase; the secrecy phase; the disclosure phase; and the suppression stage, each of which Dr. Lewittes described as some length (C52-53; D2-5). In that regard, Dr. Lewittes tries to evaluate from the child's free recall whether the child has a memory upsetting to him or her, and ascertains whether the child has been in contact with sexually stimulating media that might effect the child's interview (id.).

The court qualified Dr. Lewittes as an expert in clinical-psychological and child sexual abuse, including therapy (D2).

After being qualified as an expert, Dr. Lewittes reexplained in detail his protocol and the various phases of Child Sex Abuse Syndrome, noting in particular the anxiety and need of a child

ultimately to disclose a familial sexual event that the perpetrator directly or subtly pressures the child to keep secret (D2-7). Following that disclosure, there is frequently, "more commonly than not", a recantation phase, which (D6-7):

> usually occurs because the relationship the child has both with the perpetrator and other family members often leads to consequences which often force the child emotionally to feel like they can't go further and testify or in public continue to make the allegations they're making. So in the suppression stage there is often an active attempt by, for example, a spouse or other members of the family such as grandparents if they're available, to tell the child, in essence, to retract, to recant, to suppress their testimony because the loved family member is in some way seen by the rest of the family as being put in jeopardy, and the attitude often in the suppression stage is that if the child would only just take back their allegations then the family could re-define itself in a more historically typical

> fashion, the outside intervention agencies will go away, the outside legal consequences will fall and that the family can go back to what they consider the more normal life-style....

Thus, according to Dr. Lewittes, "more typically than not", children sexually abused by a family member (D7):

> will take back what were their original allegations and come up with some form of recantation or retraction, such as, "I lied" "I don't remember", or, "I made it up", or, "It was a dream", or, "It never happened", or, "Somebody told me to say it", or something along those lines.

Dr. Lewittes interviewed Parul P. twice, on February 3 and February 9, after she had been referred to him by the Commissioner (D8-9).

At the first meeting, Parul stated that she had made allegations to a number of people that her father had sexually

touched her, taking her hand and placing it on his penis, and placing his hand on her "butt" (D10). Then, testified Dr. Lewittes (D10-13):

> [S]he stated to me that she had been thoroughly convinced that these events had, indeed, occurred for a long period of time, that she had held onto these events for over a year, that she was uncomfortable in discussing these events because she was afraid of what her mother's reaction would be. I asked her what she was afraid of. She told me she was afraid that the mother would in some way not believe her. I think Parul stated something to the effect that her mother would ask the question, "How could a good man like your father do something like that?" Stating that she was frightened of her mother's reactions and that she was afraid that the mother would not believe her, she held onto it for approximately a year. She said that eventually she felt the need to disclose it and did so in a school setting and continued to maintain these allegations consistently, she told me, to a number of different people,

including a school social worker, I think she told me her school principal and also to her official teacher. She outlined what she consistently told people what she believed to be a truthful story of the events that had occurred to her with her father. She stated to me she went to a court hearing and following the court hearing she came home and she thought very hard about what she was saying and she decided that what she had reported was really a dream. She told me she was frightened of the court proceedings, that she was extremely upset by them. She also related to me that she was upset that her father had been removed from her home. She stated she felt responsible for that. Based upon her allegations, she also stated she was afraid her father can be sent to jail, and she told me she did not want these things to happen to him, and she continued to maintain to me that, indeed, all of these initial allegations were the product of a dream. I asked her more details about the dream, for example, I asked her, could she remember which hand her father had taken when he placed it on his penis, and she was able to readily answer

that he took her right hand and placed it on his penis. I asked her the details, could she remember whether or not her father's hand had actually touched the skin of her butt or whether she knew or whether or not it had touched on top of or inside of her. She readily answered that she knew that her father touched underneath her nightgown, touching her skin, and that he did not insert his finger into her buttocks. I asked other detailed questions about what the nature of the events were, such as where she was when the father did this touching. She stated she was in bed when he touched her. I asked her the time of day. She said it had been following her mother's leaving for work which she described as in the early morning hours and that she stated to me that she had no other dreams of any other man ever touching her; she had no other experience of any other man touching her; she had viewed no explicit sexual material of anybody else doing the things she had reported to me, and she also reported to me that she was very upset at these interactions; she did not enjoy them at all and she was very concerned and she had asked herself the question,

"How could her father who she loved have done such a thing to her?", because she basically said to me she herself had difficulty reconciling the man she loved doing this to her.

Q. Did you find her reaction to be unusual?

A. In my professional opinion, I felt that her reactions were highly consistent with other children which I examined which have, indeed, been found to be sexually abused within a familial setting, the perpetrator having been the father and the child being the daughter; that her reactions of feeling traumatized, feeling upset, feeling anxious, feeling conflicted about admitting these things, feeling conflicted about implicating a beloved parent figure I found to be consistent with my own professional experience, reading the literature and also my own examinations of children.

Dr. Lewittes' second interview with Parul, on February 9, was similar (D15-18).

Dr. Lewittes observed that Parul's description of the events as a dream was inconsistent in character and style with the way children talk about actual dreams; instead, the dream story was offered as an explanation rather than being an actual dream (D20). Parul's dream story was consistent with the suppression or recantation phase of intra-familial child sex abuse syndrome, where a child retracts under emotional stress, fear and pressure, and needs to come up with some sort of alternative explanation for what was initially stated, frequently and consistently, as fact (D18, D6-7).

Indeed, the way Parul had said it, Parul (D20-21)

> used the word -- she made a decision following the court proceeding. She wasn't able to

> detail to me what the court proceeding was, who the people in the court were, whether it was the Family Court or any other kind of court, and she discussed being extremely upset and frightened by the court process. She identified the fear, the upsetment as preceding going home, thinking hard and making a "decision" that rather than continue to make the allegations that what she had really experienced was a dream and not, indeed, a fact.

The extensive cross-examination of Dr. Lewittes by petitioner's counsel occupies almost the entirety of four of the remaining fact-finding transcripts from February through June, 1990.

Initially, Dr. Lewittes told petitioner's counsel that he would be glad to produce his notes, and tape recordings of 99% of his interview with Parul (D24, E26-30) and, as petitioner's counsel later conceded, Dr. Lewittes did

produce them to the judge in the criminal proceeding in which the same law firm represented petitioner -- after petitioner's counsel served him with that subpoena while he was on the stand in the Family Court (E57-59, H-8). Since the Commissioner objected to their production (D24), the Family Court judge instructed petitioner's counsel to subpoena them if he wanted them, subject to the Commissioner's and the law guardian's motion to quash. Other than a belated attempt to subpoena them after days of cross-examination -- which called for their production on the wrong day, a date when the court was not scheduled to be in session on this case (H13) -- there is no indication that petitioner subpoenaed the tape to Family Court. Nor did he pursue any motions to compel or for contempt

although -- without evidence -- he contended that his subpoenas had not been honored (H8: counsel concedes Lewittes sent a copy of the tape to the judge in the criminal proceeding); cf. G5-6 (claim that Dr. Lewittes did not appear at Supreme Court in response to subpoena).

Petitioner's counsel tried to suggest that the superintendent, petitioner's friend, had abused Parul, and that that abuse in a different manner by a different person was the abuse detected by Dr. Lewittes. Parul had not discussed with Dr. Lewittes that she had been abused by the superintendent. However, Dr. Lewittes explained that while any sex abused child may have anxiety, depression and trauma (E9-10), intra-familial sex abuse syndrome, that displayed by Parul, has different

characteristics from sex abuse by a non-family member with whom a child might generally otherwise have a relationship of love and trust (D33-35). Parul displayed "very significant" symptoms that are "highly identifiable" with the intra-familial child sex abuse syndrome (E53-56).

Specifically, while a non-family abuser may be extremely rough and brutal to a child, secrecy and the resulting stresses imposed by a parental abuser may not be present (id.). The child may not have the same fear of disbelief, or fear of one parent being put into conflict by having the spouse identified as having abused the child (id.). In the suppression stage, the child's suppression may be internal only, a suppression of trauma, while external

sources, such as parents, may be telling the child to express rather than to recant the allegations (D34-35).

In contrast, Parul's age-inappropriate accurate sexual knowledge -- combined with her deciding that an incident described in explicit detail was a dream -- is "very characteristic" of intra-familial child sex abuse syndrome (E54-56, E60-61), particularly since children will not commonly have such a detailed recollection of a dream that occurred many months before (E60-61).

Often a child's initial reason for disclosure is to gain some protection so that the abuse is sure not to continue; but the child does not want this protection to take the form of actually harming the loved parent (E57-58). Parul directly expressed her fear that her

father would be put in jail (E56-57), and there had been a continuing order of protection, barring contact, which would itself prompt a child to "recant" (E60). Parul -- who had said that she loves her father (E38) -- had decided it was a dream after an upsetting and confusing court session (F4).

During his lengthy cross-examination, petitioner's counsel made numerous references to witnesses and events involved in the criminal sexual abuse proceeding against petitioner and to the incident in which the building superintendent allegedly sexually abused Parul (F15-20, F29-32, 30-33; H49-50).

The court then asked Dr. Lewittes if he was aware of information which he did not know when he formed an opinion. Dr. Lewittes observed "that there has been

hours of testifying in my opinion, by counsel about a lot of data and I had no awareness of and by sitting here hearing all about other children, other defendants, other cases, other validators" (H93-94, emphasis added), which was new to him. The witness said that if the information were true, it would be desirable to retain someone else as well to form another opinion (id.). However, Dr. Lewittes did not say that another validator would come to a different opinion (H94); indeed, even after having been "informed" by petitioner's counsel of his view of the case, Dr. Lewittes stated to the court that (H98-99).

> The answer to your question continues to be I do not feel that there is any more information that I need in order to continue to make the

> statements that were filed in the report, which I believe has been introduced into evidence, that report, I do not change my opinion that was stated in that report.

Asked by the court whether he believed another validation was required, Dr. Lewittes responded " I would have to answer that I do not understand the need for a further investigation of the child" (H99).

Petitioner's counsel nonetheless applied to the court for the appointment of an independent validator (H106-110, H146-147). Significantly, however, petitioner's counsel said that he would "absolutely not" consent to having the new validator interview petitioner (H146-147).

But the Commissioner did not object to a second validation, and the court in

fact said that if the attorneys agreed on a name it would authorize a second validator, acceding to petitioner's request (H148-151).

Petitioner's counsel then withdrew the application for another validation (H152-153).

Petitioner's counsel moved to dismiss at the close of the Commissioner's case on numerous grounds, including that the Commissioner had failed to establish a prima facia case (H155-169) and that the appropriate burden of proof in a sexual abuse proceeding would be clear and convincing evidence due to the stigma attached to an abuse finding (H163-164). However, on reconvening at the next hearing date, petitioner withdrew that motion (I1).

Contrary to his many previous representations about calling numerous witnesses to connect his lengthy hypothetical questions, and his demand for a Gujarti interpreter, and his request that the Court set aside the entire month of August for the presentation of his case (G13-19), petitioner then also rested, without taking the stand or calling a single witness (I1). Then, without any specificity as to grounds, petitioner made "all the appropriate motions at the end of my case" (I1-2).

**FACT-FINDING DECISION OF THE FAMILY COURT**

In a decision and order (one paper) entered October 12, 1990, the Family Court, Queens County (Edward Kaufman, F.C.J.), found that Parul was an abused

child within the meaning of section 1012(e)(iii) of the Family Court Act, in that petitioner committed against Parul Sexual Abuse in the Third, Second and First Degrees (respectively P.L. 130.55, 130.60, and 130.65).

After reviewing the evidence and applicable law in detail, the court observed (Petitioner's Appendix B at 13a-16a):

> Parul made out-of-court statements that her father had sexually abused her to her teacher, her principal, Ms. Gelber and Ms. Housen. Those initial statements were consistent (see Matter of Starr H., 156 A.D.2d 1024), and were before she was under pressure to recant. There is no suggestion of any motive on her part to falsely accused her father (Cf. Matter of Kimberly X., 133 A.D.2d 226 [evidence that child fabricated statements because of problems she was having at home and out of a desire to protect her natural father]). Nor is there

any evidence that Parul is psychologically disturbed (Cf. Matter of Linda E., 143 A.D.2d 904, app. den. 69 N.Y.2d 613 [child suffered from an undersocialized conduct disorder, evidenced in part by an excessive and precocious sexual preoccupation]), or that her parents are involved in a custody battle (Cf. Matter of Smith, 128 A.D.2d 784 [sexual abuse allegations made during pendency of volatile divorce proceedings]; see A. Rosenfeld, C. Nadelson & M. Krieger, Fantasy and Reality in Patients Reports of Incest, 40 J. Clin. Psychiatry 159 [1979]).

Parul's initially consistent out-of-court statements were persuasively corroborated by the expert "validation" testimony of Dr. Lewittes, who is an expert with the requisite ability to interpret behavior and information elicited from interviews within a conceptual framework for child sexual abuse. He was able to conclude that Parul's case is consistent with other cases of child victims of intra-familial sexual abuse. After careful evaluation, he was able to discount Parul's statements that a superintendent molested

her and that her original allegations were "dreams". These belated assertions by Parul, he concluded, are consistent with the "suppression stage" of the intrafamilial child sexual abuse syndrome. This stage of the syndrome, he testified, occurs when both inward pressure from the child and outward pressure from family members cause the child victim to "recant" the original allegations in order to reunite the family, protect a loved parent, and eliminate the fear and embarrassment associated with the intervention of outside agencies and the courts.

Dr. Lewittes' conclusions comport with clinical and scientific literature, which makes clear that many sexually abused children recant their original allegations (Myers, Bays, Becker, Berliner, Corwin & Saywitz, Expert Testimony in Child Sexual Abuse Litigation, 68 Neb. L. Rev. 1 (1969); Sgroi, Handbook of Clinical Intervention in Child Sexual Abuse at 24-27 [1982]). This happens so frequently that experts now consider recantation one aspect of the child sexual abuse syndrome

(Summit, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177 [1983]).

* * *

> Finally, Parul's initially consistent out-of-court statements are also corroborated by [petitioner's] statements to Ms. Gelber on April 7. While somewhat ambiguous, these statements provide additional assurance that Parul's out-of-court statements are reliable, and that the evidence as a whole supports a finding of sexual abuse.

The Court concluded that Parul was abused, making the appropriate sex offense findings required by section

1051(e) of the Family Court Act.[4]

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[4] A dispositional hearing was held on January 17, 1991. Luis Salinas, a caseworker with the Child Welfare Administration, conducted an investigation and report for the Family Court. His written report was admitted into evidence (J28). Mr. Salinas reported that Parul and her younger sister were presently living in India with close relatives. Mrs. P. informed him that she "believe[d] her daughter's story concerning sexual molestation" and had sent her daughter to India "because she did not want them to remain in the apartment with her husband" (J25; I&R at 2). Mrs. P. stated that she continued to reside with respondent "because she loves him" (J25; I&R at 2).

Petitioner did not take the stand or present any evidence.

At the conclusion of the hearing, the Family Court ordered that Parul be released to the custody of her mother. The Court also issued an order of protection directing that petitioner "is not to live with the child unless prior application to do so is made to the Family Court, and that the mother is not to permit the child to visit with the father unless the mother supervises such visitation" (J34). The Court stated that this requirement was intended to ensure that there would be "an opportunity to evaluate the propriety of such a return before the child is permitted to do that"

(continued...)

## OPINION OF THE INTERMEDIATE STATE APPELLATE COURT

The Appellate Division, Second Department affirmed the order of the Family Court, stating that the finding of abuse by the father was supported by a preponderance of the evidence (Family Ct. Act § 1046[b][i]).

The Court noted that at the fact-finding hearing a social worker from the child's school and a caseworker assigned to investigate the allegations of abuse each testified to out-of-court statements made by the child detailing the sexual abuse by her father. The Court noted

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[4] (...continued)
after completion of a Mental Health study (J35). Petitioner did not challenge any aspect of that order on appeal to the Appellate Division, rather his challenge was solely to the fact-finding determination brought up for review by the dispositional order.

that each of the child's accounts of abuse were consistent with one another. Moreover, a psychologist, qualified as an expert in child sexual abuse, who interviewed the child, testified that the child's statements and behavior were consistent with the five stages of the inter-familial, child sex-abuse syndrome. The Court held that the validating evidence of the psychologist constituted sufficient corroboration of the child's statement to support the finding.

The Court considered petitioner's other arguments but found them to be without merit.

**THE COURT OF APPEALS' DENIAL OF LEAVE TO APPEAL**

On July 1, 1993, the New York Court of Appeals denied petitioner's motion for leave to appeal.

## REASONS FOR DENYING THE WRIT

### A. PETITIONER FAILED TO CHALLENGE THE EVIDENTIARY STANDARD IN THE COURTS BELOW. IN ANY EVENT, THE STATUTORY REQUIREMENT THAT A FINDING OF ABUSE BE BASED ON A PREPONDERANCE OF THE EVIDENCE FULLY COMPORTS WITH DUE PROCESS.

(1)

To the extent petitioner seeks review based on the evidentiary standard employed by the courts below to make a finding of abuse, he withdrew his motion raising the issue in Family Court and did not raise the issue on appeal to the Appellate Division and thus has not preserved it for this Court's review.[5] See Merrill v. Albany Medical Center

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[5] Petitioner impermissibly sought to raise this issue for the first time in a motion to reargue after the Appellate Division rendered its decision. The Appellate Division denied the motion. Thereafter, the Court of Appeals denied leave to appeal.

Hospital, 71 N.Y.2d 990, 529 N.Y.S.2d 272, 524 N.E. 2d 873 (1988); Morey v. Sings, 174 A.D.2d 870, 871 (3d Dept. 1991); Lamphear v. State, 91 A.D.2d 791, 458 N.Y.S.2d 71 (3rd Dept. 1982); In re Colin R., 63 Md. App. 684, 493 A. 2d 1083, 1088 (1985).

(2)

In any event, the statutory requirement that a finding of abuse be based on a preponderance of the evidence, rather than on clear and convincing evidence, affords due process, and is fully consistent with this Court's precedents.

New York's statutory scheme contained in Article 10 of the Family Court Act establishes a two-step procedure to identify and protect abused or neglected children. First, there is a

fact-finding hearing at which abuse or neglect must be established by a preponderance of the evidence (Family Ct. Act § 1012[e],[f]; § 1046[b][i]. If a child is determined to be abused or neglected, the court must thereafter hold a dispositional hearing to determine what order of disposition should be made (Family Ct. Act § 1045).[6]

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[6] Among the dispositional options is placement out of the home for a period of one year, subject to extension for additional periods of one year each (Family Ct. Act § 1055[b]). In this case, the child victim was not even placed outside the home. Rather, in the order of disposition, custody was awarded to the mother, Anilia P., and the order directed that petitioner not visit the child without the supervision of Anila P. and prohibited him from residing in the same household as the child "unless prior application to do so is made in the Family Court." The Court reached this resolution upon being advised that the child's mother had chosen to send Parul to live with close relatives and wanted to ensure that the Court would have the

(continued...)

Petitioner, citing Santosky v. Kramer, 455 U.S. 745 (1982), contends that the fact-finding hearing was constitutionally infirm because the Family Court did not apply a standard of clear and convincing evidence. In Santosky, this Court addressed the burden of proof constitutionally required at the fact-finding stage in a permanent neglect proceeding held pursuant to Article 6 of the Family Court Act. This Court held that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support

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[6] (...continued)
opportunity to assess the situation upon her return. See n. 3, pp. 43-44. Upon information and belief, petitioner has never sought relief before the Family Court. See Family Ct. Act (respondent entitled to move to modify, set aside or vacate order at any time).

its allegations by at least clear and convincing evidence" (455 U.S. at pp. 747-748).

However, Article 10 proceedings differ fundamentally from Article 6 proceedings and thus the same conclusion is not mandated here.

As this Court noted in Santosky, determining how much process is due involves balancing "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure" Santosky v. Kramer, 455 U.S. at 754.

The New York Court of Appeals applied this balancing test in In re Tammie Z., 66 NY2d 1, 494 N.Y.S.2d 686, 484 N.E.2d 1038 (1985), and held that the

provision of Family Court Act § 1046(b) that a finding of neglect must be based on a preponderance of the evidence "affords due process under the federal Constitution". 66 N.Y. 2d at 3.[7]

In holding that the balancing of interests here differs materially from Santosky, the Court of Appeals noted that while a neglect proceeding pursuant to Article 6 may result in permanent termination of parental rights, under Article 10 the placement is only temporary.

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[7] While that case involved neglect, the reasoning applies with equal force to cases finding abuse. Indeed, the courts have expressly applied the same analysis to abuse cases. In re Katrina W., 171 A.D.2d 250, 575 N.Y.S.2d 705 (2d Dept. 1991), app. dsmd. 79 N.Y.2d 976, 583 N.Y.S.2d 194, 592 N.E.2d 802, cert. den. sub. nom., Rosalyn W. v. Suffolk County Dept. of Social Services, __U.S.__, 113 S. Ct. 217, 121 L.Ed. 2d 156 (1992).

The Court of Appeals also found a fundamental difference relating to the risk of error. In an Article 6 termination proceeding, the child has been in the care of an authorized agency for a period of more than one year and even if a termination proceeding fails for lack of proof, "'a judge has ample discretion to ensure that ... a child will not return to a hostile environment'" In re Tammie Z., 66 N.Y.2d at 687, quoting Santosky v. Kramer, 455 U.S. at p. 766, n. 16, by issuing orders extending foster home placement. Accordingly, "'[f]or the child the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo'" Id. quoting Santosky, 455 U.S. at 765-766.

However, the Court of Appeals noted that in Article 10 proceedings, an erroneous failure to place the child may have "disastrous consequences." Id. Pursuant to Family Court Act § 1051[c], if abuse or neglect is not proved, the court must dismiss the petition. While temporary placement or protection may be ordered (Family Ct. Act § 1027[a]), that placement or protection remains in effect only pending a final order of disposition, at which time the child is returned to the parents. Id.

Thus, the Court of Appeals properly concluded that in Article 10 proceedings, a finding based on a preponderance of the evidence fully comports with due process. Other jurisdictions which have considered the issue are in accord. See e.g., Raboya v. Shrybman & Associates, 777 F.

Supp. 58, 60 (D.C. 1991) ("[B]ecause the statutory scheme for child neglect involves at most a temporary suspension of parental rights, due process only requires that a finding of neglect be based on a preponderance of the evidence"); In re N.H., 569 A.2d 1179, 1181-1183 (D.C. App. 1990); Delahunty v. Hawaii, 677 F. Supp. 1052, 1057 (D. Haw. 1977); In re J.K., 49 Wash. App. 670, 745 P.2d 1304, 1306 (1987); In re Colin R., 63 Md. App. 684, 693, 493 A.2d. 1083, 1089 (1985); In re O.E.P., 654 P.2d 312, 315-17 (Colo. 1982) (en banc); In re K.B., T.B., and S.B., 302 N.W.2d 410, 411 (S.D. 1981); see also, Rivera v. Minnich, 483 U.S. 574 (1987) (Pennsylvania's preponderance standard for determining paternity is constitutionally permissible).

**B. PETITIONER WAS NOT DEPRIVED OF A FAIR TRIAL. THERE IS NO BASIS IN LAW OR THE RECORD FOR PETITIONER'S MERITLESS CONTENTIONS THAT HIS RIGHTS WERE VIOLATED BECAUSE THE ABUSE PETITION WAS INDEFINITE AS TO WHEN HE ABUSED THE CHILD OR THAT HE WAS DEPRIVED OF REQUIRED DISCOVERY MATERIAL.**

Petitioner fatally fails to distinguish proceedings under Article 10 of the Family Court Act from criminal proceedings governed by the Criminal Procedure Law. As the Court of Appeals has reiterated, "a child abuse or neglect proceeding under Article 10 of the Family Court Act is a civil proceeding for the protection of the child alleged to be abused or neglected," not a criminal proceeding. People v. Smith, 62 N.Y.2d 306, 309, 311-316, 476 N.Y.S.2d 797, 465 N.E.2d 336 (1984) (filing Article 10 petition does not trigger accused's right to counsel with respect to a criminal

charge arising from the same facts; and, unlike a criminal proceeding, right to counsel may be waived in the absence of counsel). "Because the accused parent is not subject to criminal sanctions in a child protective proceeding, the Legislature has provided that the usual rules of criminal evidence do not apply." In re Nicole V., 71 N.Y.2d 112, 117, 524 N.Y.S.2d 19, 518 N.E.2d 914 (1987).

Thus, unlike criminal proceedings, the exclusionary rule does not apply to Article 10 proceedings. In re Diane P., 110 A.D.2d 354, 494 N.Y.S.2d 881 (2d Dept. 1985), app. dsmd., 67 N.Y.2d 918, 501 N.Y.S.2d 1027, 492 N.E.2d 1235 (1986). Unlike criminal proceedings, the respondent's failure to testify allows the fact-finder "to draw the strongest inference against [him] that the opposing

evidence in the record permits". In re Tammy L., 132 Misc.2d 722, 723, 504 N.Y.S.2d 1011 (Fam. Ct., Onondaga Co. 1986), quoting Commissioner of Social Services v. Phillip DeG., 59 N.Y.2d 137, 141, 463 N.Y.S.2d 761, 450 N.E.2d 681 (1983). The preponderance of the evidence is sufficient to justify a finding, rather than a conclusion beyond a reasonable doubt. In re Tammie Z., 66 N.Y.2d 1, 494 N.Y.S.2d 686, 484 N.E.2d 1038 (1985). The unsworn testimony of minors is permitted, In re Elizabeth D., 139 A.D.2d 66, 530 N.Y.S.2d 397 (4th Dept. 1988), app. dsmd. 73 N.Y.2d 871, 537 N.Y.S.2d 495, 534 N.E.2d 334 (1989), as, of course, is certain hearsay, Nicole V., supra. Parents may be required to proceed in an expeditious Family Court proceeding necessary to protect the

child, rather than hold it in abeyance, even against their claim that their Family Court testimony will prejudice their defense of a subsequent criminal proceeding. In re Germaine B., 86 A.D.2d 847, 447 N.Y.S.2d 448 (1st Dept. 1982). And, as is well settled, a respondent may be excluded during the child's testimony. In re Donna K., 132 A.D.2d 1004, 518 N.Y.S.2d 289 (4th Dept. 1987).

It is only by wholly ignoring this settled body of law that petitioner is able to contend that his rights were violated because he was denied Brady material and that he was prejudiced in his defense by lack of a narrow time frame in the petition.

Both contentions also ignore the distinct statutory provisions that apply. Unlike an Article 10 petition, which

requires the allegation only of "facts sufficient to establish that a child is an abused or neglected child," see Fam. Ct. Act, § 1031(a), an indictment must allege where, when and what the defendant did. See C.P.L. 200.50; People v. Morris, 61 N.Y.2d 290, 293-295, 473 N.Y.S.2d 769, 461 N.E.2d 1256 (1984); People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790, 502 N.E.2d 577 (1986).

Notably, even in a criminal proceeding an otherwise fatal indefiniteness as to time in an indictment may be cured by a response to a Bill of Particulars. Morris, supra, 61 N.Y.2d at 293. Article 10 of the Family Court Act simply carries this several steps further: it contemplates the possibility of full discovery unavailable under the C.P.L. Indeed, section 1038 of

the Family Court Act authorizes use of every discovery measure available under Article 31 of the C.P.L.R., unless otherwise proscribed in Article 10. Thus, in view of the opportunity for civil discovery, there is no basis for applying the Brady rule developed in the context of criminal proceedings in which discovery is far more circumscribed.

Similarly, the purpose behind the requirement that indictments be definite -- "to provide the accused with fair notice of the charges against him" and "to enable him to answer to the charges and to prepare an adequate defense" (People v. Keindl, supra, 68 N.Y.2d at 416) -- is accomplished in Article 10 through different means: far broader discovery than the C.P.L. permits. There is no basis for applying to this civil

proceeding the distinct definiteness requirements specifically required by the C.P.L., which have no counterpart in the Family Court Act.

Indeed, there is substantial reason not to do so. As described above, the very nature of intra-familial sexual abuse may result in substantial time having passed before disclosure is made and proceedings are brought. Because of the lapse of time, the child's natural difficulty in placing an event in time should not be, per se, the death knell of a court's opportunity to make sure that the purposes of Article 10 are being achieved, if other evidence sufficiently supports the finding that the child has been sexually abused, and the aid of the court is required to protect a child otherwise totally without refuge, to

monitor the situation, and to provide counseling and other services to the parent and the family. This is not to say that a child's failure to be specific is wholly irrelevant; instead, any indefiniteness should go to weight of the evidence rather than bar intervention to protect a child as to whom a prima facie case of sexual abuse is made out. See In re Theresa C., 121 Misc.2d 15, 19-22, 467 N.Y.S.2d 148 (Fam. Ct., Monroe Co. 1983) (a petition for a finding of child abuse is not insufficient merely because it relies upon year-old claims).

Concerning petitioner's supposed prejudice, it is worth reiterating that the court gave petitioner's counsel the opportunity for access to the Commissioner's file, and permitted full cross-examination concerning the dates of

the occurrence.[8] There is not the slightest evidence in the record that he was prejudiced: indeed, petitioner did not even take the stand to establish an evidentiary basis for innocence by alibi, let alone innocence at all. In this regard, it is important to note that, contrary to his assertions, petitioner was never denied a Gujarti interpreter for witnesses he purportedly intended to call. Rather, the Court advised

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[8] Petitioner's contention that he was denied exculpatory information has no basis in the record; it is sheer speculation. Further, undercutting it are the facts -- omitted by him here -- that he was granted the opportunity to examine DSS's entire case file: that he succeeded in having the tape he sought delivered to the judge in the criminal proceeding; and that he failed to take any steps to enforce his purported attempts to get this information in the Family Court proceeding or to vigorously pursue the ample discovery that the Family Court Act permits (see section 1038).

petitioner's counsel that he could make the request at the appropriate time (G: pp. 18-19). He never did so. In any event, if petitioner's case were prejudiced it would be because he failed to use existing discovery devices, or to make any reasonable effort at all to rebut the substantial prima facie case presented against him. His failings are hardly a reason to import into his civil proceeding strictures applicable only to criminal proceedings governed by different statutes with distinct purposes.

In sum, petitioner received a full opportunity to oppose the petition against him, and nonetheless failed to rebut the strong prima facie case that he sexually abused his daughter, Parul. The procedural claims he raises, without any

basis in the record or applicable law, are meritless.

For all the above-stated reasons, the petition fails to present any issue warranting review by this Court.

## CONCLUSION

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.**

Respectfully submitted,

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City of New York,
Attorney for Respondent
Commissioner of Social
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LEONARD J. KOERNER,*
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of Counsel.

*Attorney of Record

No. 93-542

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

In the Matter of

PARUL P.,

A Child Under Eighteen Years of Age Alleged to be Abused by RASHMI, P.,

Petitioner,

-against-

COMMISSIONER OF SOCIAL SERVICES,

Respondent.

# LAW GUARDIAN'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

LENORE GITTIS MITTELMAN*
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December 8, 1993

BEST AVAILABLE COPY

## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. Does this Court have jurisdiction to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Department if it is not the judgment of the highest state court and if petitioner failed to raise the federal question sought to be reviewed in a timely and proper manner in the courts below.

II. In this civil child protective proceeding under Article 10 of the New York Family Court Act, does the statutory requirement that a finding of abuse be based on a preponderance of the evidence, rather than on clear and convincing evidence, comport with due process, assuming the issue is preserved for review?

III. Did the state courts properly reject petitioner's claim that he was denied a fair trial?

IV. Are the rules applicable to the definiteness of indictments, and under Brady v. Maryland, 373 U.S. 83 (1963), inapplicable to a civil proceeding pursuant to Article 10 of the Family Court Act?

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In the

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October Term, 1993

In the Matter of

PARUL P.,

A Child Under Eighteen Years of Age
Alleged to be Abused by RASHMI P.,

Petitioner,

-against-

COMMISSIONER OF SOCIAL SERVICES,

Respondent.

On Petition for a Writ of Certioraria to the New York Supreme Court, Appellate Division, Second Department

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## BRIEF IN OPPOSITION

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Repondent, Parul P., hereby submits a brief in opposition to the petition for a writ of certiorari in the above matter, pursuant to Rule 22 of the revised Rules of the Supreme Court of the United States.

## STATUTES INVOLVED

The relevant statutory provisions are set forth in the petition on pages 3, 4 and 5. In addition, the following statutes are relevant:

Civil Practice Law and Rules §5514. Extension of time to appeal or to move for permission to appeal.

> (a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

Civil Practice Law and Rules §5601. Appeals to the court of appeals as of right.

> (b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:
>
> (1) from an order of the appellate division which finally determines an

action where there is directly involved the construction of the constitution of the state or of the United States.

Civil Practice Law and Rules §5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by that appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. Such appeal may be taken.

1. in an action originating in the supreme court, county court, a surrogate's court, the family court, the court of claims or an administrative agency or an arbitration.

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right.

## STATEMENT OF THE CASE

A full statement of the case is found in the Brief in Opposition of the Respondent Commissioner of Social Services at pages 1-44.

## REASONS FOR DENYING THE WRIT

### -A-

### THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT BECAUSE IT IS NOT THE JUDGMENT OF THE HIGHEST STATE COURT.

This Court does not have jurisdiction to review the judgment of the Supreme Court of the State of New York, Appellate Division, Second Department. While petitioner sought permission to appeal to the New York State Court of Appeals, he failed to take an appeal as of right to that court. Therefore the judgment sought to be reviewed was not "rendered by the

highest court of a State in which a decision could be had" as required by Section 1257(a) of Title 28 of the United States Code.

This Court has repeatedly held that it lacks jurisdiction of a case where a litigant fails to pursue the correct method of appeal in the state courts. This result obtains even where the litigant has sought state court review by unsuccessful or inappropriate procedures. See e.g., Gotthilf v. Sills, 375 U.S. 79 (1963); McMaster v, Gould, 276 U.S.284 (1928); Southern Electric Co. v. Stoddard, 269 U.S. 186 (1925).

Civil appeals to the New York State Court of Appeals, the State's highest court, are governed by Article 56 of the New York Civil Practice Law and Rules (hereinafter C.P.L.R.). Appeals to the

Court of Appeals may be taken as of right pursuant to C.P.L.R. §5601 as well as by permission pursuant to C.P.L.R. §5602. Petitioner sought and was denied permission to appeal. However, he failed to take an appeal as of right.

Pursuant to C.P.L.R. §5601(b)(1) an appeal may be taken as of right to the New York State Court of Appeals,

> from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or the United States.

Petitioner's claims directly involve the construction of the United States Constitution. By appealing as of right, petitioner would have obtained review of his constitutional claims by the New York Court of Appeals. His failure to do so is fatal to this Court's jurisdiction.

Even after the Court of Appeals

denied permission to appeal, petitioner had thirty days from the date of the order denying permission to appeal to take a timely appeal as of right. C.P.L.R. §5514. He did not.

In sum, petitioner's failure to raise his constitutional claims as of rights in the New York Court of Appeals deprives this Court of jurisdiction. The petition for a writ or certiorari must be denied.

-B-

PETITIONER FAILED TO CHALLENGE THE EVIDENTIARY STANDARD IN THE COURTS BELOW. IN ANY EVENT, THE STATUTORY REQUIREMENT THAT A FINDING OF ABUSE BE BASED ON A PREPONDERANCE OF THE EVIDENCE FULLY COMPORTS WITH DUE PROCESS.

The law guardian adopts the argument found in the Brief in Opposition Respondent of the Commissioner of Social Services at pp. 45-53.

-C-

PETITIONER WAS NOT DEPRIVED OF A FAIR TRIAL. THERE IS NO BASIS IN LAW OR THE RECORD FOR PETITIONER'S MERITLESS CONTENTIONS THAT HIS RIGHTS WERE VIOLATED BECAUSE THE ABUSE PETITION WAS INDEFINITE AS TO WHEN HE ABUSED THE CHILD OR BECAUSE HE WAS DEPRIVED OF REQUIRED DISCOVERY MATERIAL.

The law guardian adopts the argument found in the Brief in Opposition of the Respondent Commissioner of Social Services at pp. 54-64.

## CONCLUSION

FOR THE ABOVE STATED REASONS THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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NO. 93-542

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1993

In the Matter of PARUL P.,
A Child Under Eighteen Years of Age Alleged to be Abused by RASHMI, P.,
*Petitioner,*

- against -

COMMISSIONER OF SOCIAL SERVICES,
*Respondent.*

## PETITIONER'S REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION SECOND DEPARTMENT

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**IN THE**
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*Respondent.*

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## STATEMENT

It is undisputed that the charges confronted by this Petitioner in both Criminal Court and Family Court were substantively identical and were intended to cover the same acts of complained wrong doing.

It is also undisputed that in the felony court the following occurred:

(a) The infant Parul went before the Grand Jury and Petitioner was indicted.

(b) The People served a Bill of Particulars specifying the dates of the charged acts.

(c) On the dates set out in the Peoples Bill of Particulars Petitioner demonstrated he was in India from where he returned on April 8, 1988 (23(a))

In Family Court where rights and devices necessary for a defense are denied to Petitioner, Petitioner is adjuded guilty of the same acts.

It is in this context that this Court is asked to apply the *Brady* rule to the facts of this case and to say to the State of New York that what occurred in the Family Court was in substance a Criminal Trial.

## POINT
## INFORMATION WAS WITHHELD FROM PETITIONER WHICH IMPAIRED A FAIR TRIAL

At page 30 of the Respondent Commissioner's Brief there appears the statement:

> Parul had not discussed with Dr. Lewittes that she had been abused by the superintendent.

Indeed, Dr. Lewittes so testified at the Trial:

> Q. Were you informed that the child was sexually abused by the superintendent of the building?
>
> Mr. Covell: Objection
>
> The Court: Overruled
>
> A. No
>
> (Tr 35 Feb 28, 1990)

Accompanying this reply is an exhibit of the validatior's notes and Parul's notations which calls into serious question the above testimony of the Doctor and the representation of the Commissioner before this Court. This

Exhibit clearly shows that *Frank the superintendent* was in fact discussed and identified when Purul was interviewed by Dr. Lewittes (also see Appendix F pg. 29 (1) indicating that Parul told the Police about sexual abuse by Frank the Superintendent)

If the Court examines the accompanying exhibit it will find inscribed in the notes of Dr. Lewittes on the next to the last page --*FRANK SUPERINTENDENT*--

The raw notes including notations of Parul and audio tapes were withheld from Petitioner's counsel at trial. The raw notes as redacted by the Supreme Court of the State of New York (Cooperman, J), were only provided after the Family Court fact finding trial was completed. The Appellate Division Second Department on the appeal refused to consider either the raw notes or the audio tapes.

If such materials should have been made available under *Brady*, then clearly depriving Petitioner of same was critical and fundamental error.

## CONCLUSION

In The basic interest of Justice Petitioner requests that this Court use its inherant powers to order the Commissioner to produce the unredacted raw notes and audio tapes for this Courts examination before this Court rules on the merits of the instant Petition

Respectfully Submitted,

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